No. _____

In The
Supreme Court of the United States

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,

Petitioners,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E. I. DuPONT de NEMOURS & COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Rooker-Feldman* doctrine bar federal courts from reviewing for constitutional defects the approval procedure of a state class action settlement to determine whether the state judgment is entitled to full faith and credit?

2. Does the "innocent agent" doctrine codified in 18 U.S.C. § 2(b) afford sufficient state action to maintain a 42 U.S.C. § 1983 claim where unethical class counsel wilfully deceive a state court into approving a collusive settlement that is constitutionally defective?

3. Does 18 U.S.C. § 1964 authorize private plaintiffs to obtain equitable remedies, and if so, does the availability of a broad disgorgement remedy allow district courts to certify a RICO class for settlement purposes?

PARTIES TO THE PROCEEDINGS

PETITIONERS

Richard R. Richard, Jr., on behalf of himself and all others similarly situated.

RESPONDENTS

Hoechst Celanese Chemical Group, Inc.; Shell Oil Company d/b/a Shell Chemical Company; Hoechst Celanese Corporation; and E.I. DuPont de Nemours & Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. The Fifth Circuit's Decision That The *Rooker-Feldman* Doctrine Precludes District Courts From Considering Due Process Deficiencies Or Fraud In State Class Action Settlement Procedure Conflicts With 28 U.S.C. § 1738 And Decisions Of Other Circuits	9
A. 28 U.S.C. § 1738 Requires District Courts To Determine If State Court Judgments Merit Full Faith And Credit Before Giving Them Preclusive Effect	9
B. The Fifth Circuit Decision Conflicts With Decisions Of The Ninth, Eighth And Seventh Circuits Which Hold That When A Federal Plaintiff's Injury Is Caused By An Adverse Party Or Fraud, Arises From Procedural Rather Than Substantive Challenge To The State Court Decision, Or Involves A Non-Party or Parties Denied Reasonable Opportunity To Raise Their Claims In The State Action, Then *Rooker-Feldman* Does Not Bar Jurisdiction, Even If The Claim Denies A Legal Conclusion Reached By the State Court	13

TABLE OF CONTENTS – Continued

Page

II. The Fifth Circuit Decision Conflicts With Decisions Of Other Circuits In Holding That These Facts Do Not Establish State Action..... 18

III. The Availability Of Private Equity Relief In RICO Cases Is In Conflict Among The Circuits; The Fifth Circuit's Application Of The Disgorgement Remedy In RICO Cases Conflicts With The Second Circuit's And Not Permitting Petitioners To Amend Their Pleadings Conflicts With The General Approach Of The Circuit Courts 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Allen, 48 F.3d 259 (7th Cir. 1995) 17

Amchem Prod., Inc. v. Winsor, 521 U.S. 591 (1997) 12, 13, 19, 20

Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) 23

Catz v. Chalker, 142 F.3d 279 (9th Cir. 1998) 12, 15

Commodity Futures Trading Commission v. British American Commodity Options Corp., 788 F.2d 92 (2d Cir. 1986) 21

Conley v. Gibson, 355 U.S. 41 (1957) 19

Cox v. Shell Oil Co., No. 18,844 (Chanc. Ct., Obion County, Tenn., Nov. 17, 1995) ..... *passim*

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) ..... *passim*

DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 258 (1992) 21

Dennis v. Sparks, 449 U.S. 24 (1980) 7, 18

Emery v. American General Finance, Inc., 71 F.3d 1343 (7th Cir. 1995) 8

Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997) 19

Federal Trade Commission v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) 21

Garrett v. Tandy, 295 F.3d 94 (1st Cir. 2002) 19

GASH Associates v. Village of Rosemont, 995 F.2d 726 (7th Cir. 1993) 15

Gorski v. New Hampshire Dept. of Corrections, 290 F.3d 466 (1st Cir. 2002) 19

TABLE OF AUTHORITIES – Continued

Page

H. J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 24

Hansberry v. Lee, 311 U.S. 32 (1940) 17

Holmes v. Securities Invertor Protection Corp., 503 U.S. 258 (1992) 21

ITT Corp. v. Intelnet Int'l Corp., 2004 U.S. App. Lexis 8168 *13-14 (3d Cir. April 26, 2004) 5, 14

Janigan v. Taylor, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965) 21

Johnson v. DeGrandy, 512 U.S. 997 (1994) 16

Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) 17

Kougasian v. More, 359 F.3d 1136 (9th Cir. 2004) 14

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 9

Leatherman v. Tarrant City Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 5

Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001) 19

Liedtke v. A-Able Bonding, 75 F.3d 200 (5th Cir. 1994) 12

Matsushita Elec. Indus. Co., 516 U.S. 367 (1990) 4, 9, 12

Noel v. Hall, 841 F.3d 1148 (9th Cir. 2003) 13, 14

NOW v. Scheidler, 537 U.S. 393 (2003) 8, 20

NOW v. Scheidler, 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003) 8, 20

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 19

TABLE OF AUTHORITIES – Continued

Page

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 4, 5, 11, 12, 13, 19

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 21

Pross v. Katz, 784 F.2d 455 (2d. Cir. 1986) 23

Regina v. Saunders, 2 Plowd. 473 (1575) 7

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) ..... *passim*

Simes v. Huckabee, 354 F.3d 823 (8th Cir. 2003) 11, 16

SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978) 8

SEC v. First Jersey Securities, Inc., 101 F.2d 1450 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997) 8, 21

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 19

Spencer v. Shell Oil Co., No. CV94-074 (Cir. Ct. Greene County, Ala.) 6, 7

Techt v. Hughes, 229 N.Y. 222, 128 N. E. 185 (1920), *cert. denied*, 254 U.S. 643 (1920) 24

Tel-Phonics Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134 (5th Cir. 1992) 23

United States v. Carson, 52 F.3d 1173 (2d Cir. 1996) 8, 21, 22

United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992) 18

United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997) 18

United States v. Lester, 363 F.2d 68 (6th Cir. 1966) 7, 18

United States v. Philip Morris, Inc., 116 F.Supp.2d 131 (D.C. D.C. 2000) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Private Sanitation Industry Association of Nassau/Suffolk, 44 F.3d 1082 (2d Cir.), *cert. denied sub nom. Ferrante v. United States*, 516 U.S. 806 (1995) 21, 22

United States v. Rashwan, 328 F.3d 160 (4th Cir. 2003) 7, 18

United States v. Smith, 584 F.2d 731 (5th Cir. 1978) 18

United States v. Turkette, 452 U.S. 576 (1981) 24

Warner v. Alexander Grant & Co., 828 F.2d 1528 (11th Cir. 1987) 8

STATUTES:

Title 18, United States Code
§ 2(b) 2, 18
§ 242 18
§ 1962 7
§ 1964 ..... 2, 7, 24

Title 28, United States Code
§ 1738 ..... 2, 9, 11, 14

Title 42, United States Code
§ 1983 ..... 3, 7, 13, 18

Public Laws of the United States P.L. 104-67, § 107 24

TABLE OF AUTHORITIES – Continued

Page

RULES:

Tennessee Code, Rules of Civil Procedure
Rule 23.05 ..... 12, 19

Federal Rules of Civil Procedure
Rule 23(e) 12

OTHER AUTHORITIES:

CARL KAYSEN et al., ANTI-TRUST POLICY (1959) 24

JOSEPH HELLER, CATCH-22 (Dell Publishing Co. 1985) 10

CHARLES ALLEN WRIGHT & ARTHUR R. MILLER & EDWARD H. COOPER 18(b) FEDERAL PRACTICE & PROCEDURE § 4469 (2002) 16

HENRY WEIHOFFEN, LEGAL WRITING STYLE (1961) 21

The Economist June 28, 2003 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 19, 2003.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Texas (Texarkana Division) is reported at 208 F.R.D. 575 (E.D.Tex. 2002) and reprinted in the Appendix to this Petition. (App. 21-53.)

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 355 F.3d 345 (5th Cir. 2004) and reprinted in the Appendix to this Petition. (App. 1-20.)

The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing and rehearing *en banc* is reprinted in the Appendix to this Petition. (App. 59-60.)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 19, 2003. (App. 54-55.) Petitioners' timely petitions for rehearing and rehearing *en banc* were denied on February 11, 2004. (App. 59-60.)

STATUTORY PROVISIONS

18 U.S.C. § 2(b) provides, in relevant part:

Whoever wilfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1964 provides, in relevant part:

(a) . . . district courts . . . shall have jurisdiction to prevent and restrain violations of section 1962 . . . by issuing appropriate orders, including but not limited to: ordering any person to divest himself of any interest . . . in any enterprise; imposing reasonable restrictions on the future activities of any person . . . , or ordering dissolution or reorganization of any enterprise. . . .

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . , as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of the suit, including a reasonable attorneys' fee. . . .

28 U.S.C. § 1738 provides, in relevant part:

Judicial proceedings . . . shall have the same full faith and credit in every court within the United

> States . . . as they have . . . in the courts of such State . . . from which they are taken.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, a suit in equity, or any other proper proceeding for redress.

STATEMENT OF THE CASE

This Petition sets out multiple conflicts among the circuits raised by the Fifth Circuit's decision: (1) the misapplication of the *Rooker-Feldman* doctrine[1] to insulate collusive state class actions from constitutionally-based federal court review sought by individuals not members of the class, (2) the disregarding of the theory of innocent agency to make out state action in civil rights actions based on violations of constitutional rights, and (3) the gutting of the equitable remedy of disgorgement under RICO as a theory to sanction perpetrators of class action frauds. Review by this Court, therefore, is required.[2]

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[1] The *Rooker-Feldman* doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under *Rooker-Feldman*, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court.

[2] While these are the principal issues, this Petition necessarily includes other conflicts:

(Continued on following page)

The principal issue here involves the application of the *Rooker-Feldman* doctrine. The doctrine bars federal courts from considering subsequent claims *only* insofar as prior state judgments are entitled to full faith and credit – a question, in the first instance, that is a matter of state law. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) ("a federal court must give the judgment *the same effect* as it would have in the courts of the State in which it was rendered") (emphasis added).

Here, the Fifth Circuit recognized that if the state court procedures were constitutionally improper, then *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (courts may exercise jurisdiction over absent class members only if due process procedures are met), establishes that Respondents were not bound by the prior state court judgments, and the *Rooker-Feldman* doctrine did not apply. (App. 9-10.) Nevertheless, the decision of the Fifth Circuit permits state courts to execute an end run around these constitutional protections. The Circuit perversely held that federal courts may not consider whether the state procedures were consistent with due process because "a federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment." (App. 11.)

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1. With the Seventh and Eleventh Circuits on the right to amend a complaint to reflect the law (*infra* nn.6 and 13), and

2. With the Ninth and Second Circuits on the right to amend a complaint to reflect new pleading requirements in the law (*infra* n.18).

This reasoning sets up a false dichotomy between *Shutts*, which holds that due process requirements must be met in *all* class action judgments, 472 U.S. at 803-06, and *Rooker-Feldman's* prohibition against federal court review of state court judgments or findings. The dichotomy ignores that under the Supremacy Clause, Tennessee courts themselves are obligated to apply the *Shutts* requirements. Accordingly, to give *Cox v. Shell Oil Co.*, No. 18,844 (Chanc. Ct., Obion County, Tenn., Nov. 17, 1995) – or any other jurisdictionally defective state court judgment – preclusive effect over claims of an absent class member is wrong as a matter of *state* law. Thus, the scope of *Rooker-Feldman* is initially limited by state law.[3] And, if the *Rooker-Feldman* doctrine does not apply, then issues arise, noted below, concerning Petitioners' civil rights and RICO claims.

Petitioners own and live in mobile homes in Texas that were damaged by leaks from a polybutylene ("PB") plumbing system that Respondents defectively made and fraudulently marketed.[4] Damages approach eight billion dollars. During years of widespread litigation, Respondents contested all PB cases. Then, in an effort to cap their PB liability, they suddenly caused to be brought and immediately settled two state class actions, both filed in out-of-the way venues – *Cox* (Obion County, Tenn.) – and

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[3] *See, e.g., ITT Corp. v. Intelnet Int'l Corp.*, 2004 U.S. App. LEXIS 8168 at *13-14 (3rd Cir. April 26, 2004).

[4] This statement of facts derives from Petitioners' pleadings, which are accepted as true for purposes of a motion to dismiss. *See Leatherman v. Tarrant City Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). (*See* App. 3-6.)

Spencer v. Shell Oil Co., No. CV94-074 (Cir. Ct. Greene County, Ala.).

These two class actions purportedly covered *all* PB litigation then pending anywhere or to be filed in the future, even though *Cox* and *Spencer* were filed in state courts that could not obtain jurisdiction over out-of-state individuals unless constitutional processes were followed. Petitioners did not have (and as an absent *future* class member, *could* not have had) notice of the Tennessee or Alabama class actions. They could not, in fact, receive adequate representation by the present class representatives (no subclass was established for future class members) or by the class counsel who filed and immediately settled the actions. Both settlements favored Respondents, containing, for example, an obscure loophole that excluded countless leaks from recovery and providing that funds not distributed to the class would be returned to Respondents when administration of the funds terminated, contrary to standard practice. Substantial side payments to class counsel were made but not disclosed to class members or the courts that approved the settlements.

During the district court proceedings in this litigation, Petitioners and DuPont, which did not admit any wrongdoing in the prior litigation, agreed to a settlement that would rectify defects in the original settlements, for example, adding additional money to the fund, giving class members constitutionally adequate notice, and closing the loophole, noted above, for members of the new class. DuPont's laudable efforts to do the right thing for members of the class were frustrated by its fellow Respondents. The settlement, of course, was contingent on the district court finding that it had jurisdiction to settle the litigation on a nation-wide basis, as the state courts had not had. As

such, the settlement has not yet been implemented, much to the detriment of the rights of the class.

In the instant litigation, Petitioners also made a civil rights claim under 42 U.S.C. § 1983 based on the unconstitutional settlement of the class actions. Two theories support the "state action" portion of Petitioners' claim. First, the *Cox* judge was an "innocent agent" of unethical class counsel. "Innocent agent" jurisprudence, reflecting law settled at least as early as the 16th century,[5] holds responsible for civil rights violations private actors who willfully cause innocent state actors to perform proscribed acts. *See, e.g., United States v. Rashwan*, 328 F.3d 160, 165 (4th Cir. 2003). Thus, the Fifth Circuit here conflicts with *Rashwan*. Second, the Tennessee court's judicial independence was compromised. The record raises the substantial possibility of judicial malfeasance (bribery) sufficient to constitute state action by the state judge, or at least mandate remand to amend and conduct discovery to establish the facts. *See Dennis v. Sparks*, 449 U.S. 24, 29 n.5 (1980) ("To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.").

Finally, Petitioners contend that 18 U.S.C. § 1964, RICO's civil remedies section, allows them to seek disgorgement of profits Respondents unlawfully obtained in violation of 18 U.S.C. § 1962. The Fifth Circuit restricted RICO's disgorgement remedy to reach only future action,

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[5] *See United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) (tracing doctrine back to *Regina v. Saunders*, 2 Plowd. 473 (1575)).

and, even at that, precluded its application here. The Fifth Circuit was skeptical of, but did not reach, the question of private equity relief under RICO upheld in *NOW v. Scheidler*, 267 F.3d 687, 697-98 (7th Cir. 2001), *cert. granted on issue, but rev'd on other grounds*, 537 U.S. 393, 397 (2003). The Court disposed of the question by giving a narrow construction to RICO's disgorgement remedy (if any, in the view of the panel), that is inconsistent with disgorgement jurisprudence. *SEC v. First Jersey Securities, Inc.*, 101 F.2d 1450, 1474 (2d Cir. 1996) (purpose of disgorgement is deprivation of past illegal gains and general deterrence).[6] It is even inconsistent with the decision of the Second Circuit that it purported to follow: *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995).

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[6] Petitioners were denied an opportunity to amend to conform with requirements, which were imposed for the first time contrary to Fifth Circuit precedent (*SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)). As Judge Wiener's dissent correctly observes, the majority's narrow interpretation elevates form over substance. (App. 19.) It was unfair to require Petitioners to allege "those talismanic words" that "disgorgement would 'prevent and restrain' similar RICO violations in the future" (*Id.*) when the Fifth Circuit had not articulated such a requirement before and to deny Petitioners an opportunity to amend. Thus, the Court's decision is contrary to amendment jurisprudence. *See, e.g., Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision That The *Rooker-Feldman* Doctrine Precludes District Courts From Considering Due Process Deficiencies Or Fraud In State Class Action Settlement Procedure Conflicts With 28 U.S.C. § 1738 And Decisions Of Other Circuits.

A. 28 U.S.C. § 1738 Requires District Courts To Determine If State Court Judgments Merit Full Faith And Credit Before Giving Them Preclusive Effect.

To understand the conflict in the circuits, an examination of the erroneous reading of the law of the Fifth Circuit is useful, although merely correcting those errors is not the principal thrust of this Petition. 28 U.S.C. § 1738, the Full Faith and Credit Act, requires a federal district court to give the same – not more and not less – preclusive effect to a state court decision as that judgment would have in the state courts of the state in which it was rendered. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). This Court has never construed the *Rooker-Feldman* doctrine to give *greater* preclusive effect to a state court judgment in federal court than the judgment would have under § 1738. Indeed, such a construction directly conflicts with § 1738. *See Matsushita*, 516 U.S. at 373.

The Fifth Circuit argues, however, that

> [t]he *Cox* court's findings that allow for certification are 'inextricably intertwined' with Richard's constitutional challenge to the state's compliance with due process requirements. A federal court

> cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment.

(App. 11.)

This construction of the doctrine gives rise to a classic Catch-22.[7] If a state court used constitutionally defective procedures to approve the settlement, then absent class members, such as Petitioners, are not subject to its jurisdiction or bound by its judgment. But determining whether a state court had jurisdiction, or used defective procedure in a class action, requires a district court to look at that procedure, as it does in other situations requiring full faith and credit. This is particularly true when the procedure at issue is plainly irregular, like *Cox's ex parte* class certification. Nevertheless, the Fifth Circuit reasoned that:

> In class action suits, the findings related to procedural due process determine class size, which ultimately affects the final judgment. The findings directly affect the substantive outcome, so challenging them would seem to conflict with the *Rooker-Feldman* doctrine. Here, Richard's allegations indisputably denounce the express findings of the *Cox* state court. Because his challenge would result in setting aside a state court judgment, *Rooker-Feldman* seems to bar federal review of these findings.

(App. 10.)

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[7] *See* JOSEPH HELLER, CATCH-22, 47 (Dell Publishing Co. 1985) ("There was only one catch and that was Catch-22. . . . Orr was crazy and could be grounded. All he had to do was ask; as soon as he did, he would no longer be crazy and would have to fly more missions. He would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. Yossarian was moved very deeply by the absolute simplicity [of Catch-22].")

In short, the Fifth Circuit – in conflict with its sister circuits – here construes the *Rooker-Feldman* doctrine so broadly that it conflicts with the rule under § 1738 requiring federal courts to follow state preclusion rules. Its decision creates a split in the circuits on the extent to which the doctrine requires that district courts avoid entertaining collateral attacks on state court judgments under *any* circumstances, even if it means subjecting individuals to judgments obtained without notice, adequate representation, proper jurisdiction, or other constitutionally mandated procedural safeguards. The Fifth Circuit's decision is breathtaking in its implication for the jurisdiction of federal courts to protect constitutional rights.[8]

The Fifth Circuit decision sets up a false dichotomy between *Shutts* and *Rooker-Feldman*. The dichotomy is false because it ignores that under the Supremacy Clause, Tennessee courts are obligated to apply *Shutts*. Under these facts, they could not give *Cox* preclusive effect as to the claims of an absent class member. *See Shutts*, 472 U.S. 797. Because *Shutts* requires enforcement of constitutional due process in *all* class actions – in both state and federal fora – requiring its application does not violate *Rooker-Feldman*. Federal courts engaging in the analysis required by *Shutts* are not reviewing the substance of the original judgment, but rather applying the analysis that *Shutts*

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[8] Most Circuits that have addressed the issue have held that when plaintiffs were denied a reasonable opportunity to raise their federal claims in a state proceeding, they may bring them in district court. *See, e.g., Simes v. Huckabee*, 354 F.3d 823, 827 (8th Cir. 2003) and cases cited therein.

requires of *every* court in subsequent actions asserted by absent class members.[9] Before *Cox* can bar the claims of absent class members, a court – whether a federal district court or a state court – must conduct the analysis required by *Shutts* and *Amchem Prod., Inc. v. Winsor*, 521 U.S. 591, 621 (1997).[10]

This procedural analysis does not constitute the review prohibited by *Rooker-Feldman*: "A Court conducting an action cannot determine the *res judicata* effect of the judgment; that effect can only be tested in a subsequent action." *Matsushita*, 516 U.S. at 396.[11] Because such analysis achieves procedural due process, not a substantive review, *Rooker-Feldman* is not implicated. *See, e.g., Catz v. Chalker*, 142 F.3d 279, 294-95 (9th Cir. 1998) (procedural due process challenge to actions of state court

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[9] Tenn. R. Civ. P. 23.05 is indistinguishable from Fed. R. Civ. P. 23(e).

[10] Justice Ginsberg recognized this in her concurring opinion in *Matsushita*:

> Every state law on the preclusiveness of judgments is pervasively affected by the supreme law of the land. To be valid in the rendition forum, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the Fourteenth Amendment's Due Process Clause. 'A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.'

516 U.S. at 395 (citation omitted).

[11] In holding that no procedural due process exception exists to *Rooker-Feldman*, the opinion followed *Liedtke*, which was not a class action case and could not provide a basis to ignore *Shutts*. *See Liedtke v. State Bar of Texas*, 18 F.3d 315, 317-18 (5th Cir. 1994).

. . . would "not contravene the heart of the *Rooker-Feldman* doctrine, the prohibition of reviewing the substance of state court judgments").[12] Thus, another conflict is presented.

B. The Fifth Circuit Decision Conflicts With Decisions Of The Ninth, Eighth And Seventh Circuits Which Hold That When A Federal Plaintiff's Injury Is Caused By An Adverse Party Or Fraud, Arises From Procedural Rather Than Substantive Challenge To The State Court Decision, Or Involves A Non-Party or Parties Denied Reasonable Opportunity To Raise Their Claims In The State Action, Then *Rooker-Feldman* Does Not Bar Jurisdiction, Even If The Claim Denies A Legal Conclusion Reached By the State Court.

In *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), the Ninth Circuit held that where the plaintiff complains of a legal injury caused by an adverse party – *i.e.*, in this matter, the damage to Petitioners' home caused by PB

[12] The Fifth Circuit's failure to analyze whether a Tennessee court would give *Cox* preclusive effect is compounded by its mischaracterizing Petitioners' § 1983 claim as a groundless effort to circumvent *Rooker-Feldman*. (App. 15.) No § 1983 claim is merely a gimmick when it accords with Fifth Circuit precedent and relies on constitutional violations that, under *Shutts* and *Amchem*, prohibit Tennessee courts from giving the *Cox* judgment preclusive effect against absent class members such as Petitioners. Similarly, the state action requirement that the Fifth Circuit finds lacking in Petitioners' § 1983 claim is *not* required under the *Shutts* analysis. The *Cox* court's failure to comply with *Shutts* bars the preclusive effect of the judgment *without regard to whether Respondents were state actors.*

plumbing – *Rooker-Feldman* does *not* bar jurisdiction, as it would if the legal injury were caused by the state judgment itself. If the federal plaintiff, and the adverse party have already litigated the state court suit to judgment, the federal plaintiff may, of course, be *precluded* from relitigating the dispute under 28 U.S.C. § 1738. *Noel*, 341 F.3d at 1163-64. The relevant state law determines who prevails under preclusion doctrine, not *Rooker-Feldman*. The Fifth Circuit is in conflict with *Noel*.

Applying *Noel*, the Ninth Circuit finds that cases raising allegations of extrinsic fraud on the state court should not be dismissed under *Rooker-Feldman*, but instead require district courts to examine the plaintiff's allegations and determine whether the claims are precluded under state law. *Kougasian v. More*, 359 F.3d 1136, 1140-41 (9th Cir. 2004) (when "a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction."). Here, too, Fifth Circuit's decision is in conflict with *Kougasian*. These cases illustrate the Ninth Circuit's sound grasp of the interplay between preclusion doctrine and *Rooker-Feldman*. By contrast, they emphasize the confusion displayed by the Fifth Circuit.[13]

[13] A recent decision of the Third Circuit attempts to parse the distinctions between *Rooker-Feldman* and preclusion. *See ITT Corp. v. Intelnet Int'l Corp.*, 2004 U.S. App. LEXIS 8168 (April 26, 2004). The very complexity of its analysis shows the need for intervention by this Court to clarify the law, which the Third Circuit observes is "pinched indeed." *Id.* *7. The Court notes that the two doctrines are "potentially misleading because of [their] close relationship." *Id.* at *11.

In the Seventh Circuit, Judge Easterbrook, with his usual precision of language, drew the distinction well in *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993):

> Preclusion in federal litigation following a judgment in state court depends on the Full Faith and Credit Statute, 28 U.S.C. § 1738, which requires the federal court to give the judgment the same effect as the rendering state would. . . . The *Rooker-Feldman* doctrine, by contrast, has nothing to do with § 1738. It rest on the principle that district courts have only original jurisdiction. . . . The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party?

Id., 995 F.2d 728-29.

Petitioners' claim is against Respondents for damages to his home resulting from fraudulent marketing of their product. In brief, Petitioners are not seeking to invalidate the state judgment for those who – unlike himself – were parties to it. He is trying to establish that because of fraud against the state court and resulting procedural deficiencies, he is free to pursue his independent claims for damages against Respondents in federal court.

The Ninth Circuit distinguishes between plaintiffs seeking to set aside state judgments because of their substance from those challenging the state court's procedure. *Catz v. Chalker*, 142 F.3d 279, 294 (9th Cir. 1989). *Catz* holds that when a plaintiff challenges procedure

rather than merits, his claim is not "inextricably intertwined" with the state court judgment; thus, it is not precluded by the *Rooker-Feldman* doctrine. *Catz* is, therefore, in conflict with the Fifth Circuit.

The Eighth Circuit's analysis is that the majority rule among Courts of Appeals is that "not every federal claim which would cast doubt on a state court judgment is barred by *Rooker-Feldman* . . . [if] . . . federal plaintiffs have not been given a *reasonable* opportunity to raise their federal claims in the state proceeding." *Simes v. Huckabee*, 354 F.3d 823 (8th Cir. 2003) (emphasis added), citing decisions from the Second, Fourth, Seventh and Eleventh Circuits. Petitioners have not received any opportunity whatsoever to raise his federal claims in any court. The conflict established by the Fifth Circuit decision requires resolution by this Court.

The error of the Fifth Circuit's decision and its conflict with settled law in the other circuits is also brought out by the unquestioned proposition that the *Rooker-Feldman* doctrine

> . . . does not defeat jurisdiction when a nonparty brings the action, even though the decision may involve matters inextricably intertwined with a state court judgment . . . a nonparty to the state action can invoke federal jurisdiction free of the *Rooker-Feldman* bar, even to permit a direct attack on a state judgment.

18(b) CHARLES ALLEN WRIGHT & ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4469.1 at 133-36 (2002); *accord, Johnson v. DeGrandy*, 512 U.S. 997, 1006 (1994).

This general rule is reflected in the Seventh Circuit's decision in *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995), which holds that *Rooker-Feldman* does not bar federal jurisdiction because it "extends only to parties . . . while specifically leaving non-parties free to pursue their claims." *Allen* cannot be squared with the decision of the Fifth Circuit.

The issue of whether Petitioners were a "party" to *Cox* depends on whether the state court obtained jurisdiction over absent class members by applying procedural rules mandated by Tennessee law *and* the Constitution. As Judge Easterbrook observed in his now classic dissent in another decision:

> When *Hansberry v. Lee*, 311 U.S. 32 (1940) held that a judgment rendered without personal jurisdiction over members of the class is not entitled to full faith and credit, the Justices did not add: "Except in federal court." . . . It gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment. . . . [A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.

Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1350-52 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing *en banc*).

II. The Fifth Circuit Decision Conflicts With Decisions Of Other Circuits In Holding That The Facts Here Do Not Establish State Action.

Petitioners' principal argument supporting their 42 U.S.C. § 1983 claim is that the requisite "state action" may be found under the "innocent agent" doctrine, which holds that one who "causes the commission of an indispensable element of the offense by an innocent agent . . . is guilty as a principal." *See United States v. Gabriel*, 125 F.3d 89, 99 (2d Cir. 1997) (*citing United States v. Concepcion*, 983 F.2d 369, 383 (2d Cir. 1992)).

The "innocent agent" here, on one theory of the litigation, was the state court judge. Corrupt class counsel willfully deceived and manipulated the judge into approving a collusive settlement; as such, they become state actors. Persons who cause another to commit a crime or tort are held responsible as principals, even though the agent who actually commits the act is innocent, and the person who causes the offense lacks the capacity to commit the offense himself. *See* 18 U.S.C. § 2(b), which codifies the principle for federal criminal law. The Fifth Circuit, too, recognizes the principle. *See, e.g., United States v. Smith*, 584 F.2d 731, 734 (5th Cir. 1978). The rule is also illustrated by *Lester*, 363 F.2d at 72, noted above. The statute at issue in *Lester* was 18 U.S.C. § 242, the criminal analogue of § 1983, where the color-of-state-law requirement is read "coextensively." *Dennis*, 449 U.S. at 29 n.5 (1980). Thus, the Fifth Circuit conflicts with *Lester* and *Rashwan*, noted above.

A second theory offered by Petitioners for the presence of the "state action" required by their civil rights claim was equally straightforward, but rejected by the Fifth Circuit. Approval of a settlement by a state court constitutes "state

action." Both Tennessee law, which requires notice to all class members before a class action is compromised, Tenn. R. Civ. P. 23.05, and constitutional due process, *Shutts*, 472 U.S. at 797, were, therefore, violated by the *Cox* settlement. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999). Petitioners, too, can prove facts consistent with their allegations of judicial or other malfeasance under *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *reaffirmed in, Swierkiewicz, N.A. v. Sorema*, 534 U.S. 506, 512 (2002). Other circuits, but not the Fifth, are following *Conley/Swierkiewicz*.[14] Hence, another conflict is presented. Petitioners, moreover, would have been permitted under these decisions to offer the evidence to support their theories. In the Ninth Circuit, for example, Petitioners would be entitled to relief if they proved that the *Cox* class counsel accepted payments to act contrary to the best interests of absent class members or colluded with Respondents to misrepresent and omit material facts. *See, e.g., Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) (absent class members can litigate the issue of adequacy of representation in subsequent federal actions). Because *Epstein* cannot be squared with the Fifth's decision, a conflict exists. In addition, this fact pattern is the precise scenario recognized in *Amchem* when this Court posited that parties "may even put one over on the court, in a

[14] *See, e.g., Garrett v. Tandy Corp.*, 295 F.3d 94, 105 (1st Cir. 2002) ("[I]t is enough for a plaintiff to sketch a scenario which, if subsequently fleshed out by a means of appropriate facts, could support an actionable claim.") (citing *Sorema*, 534 U.S. at 513); *accord, Gorski v. New Hampshire Dept. of Corrections*, 290 F.3d 466, 473 (1st Cir. 2002) (citing *Sorema*, 534 U.S. at 513). *See also Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

staged performance." *Amchem Prod., Inc.*, 521 U.S. at 621. The Fifth Circuit has, in short, reneged on the implicit promise of *Amchem*.

III. The Availability Of Private Equity Relief In RICO Cases Is In Conflict Among The Circuits; The Fifth Circuit's Application Of The Disgorgement Remedy In RICO Cases Conflicts With The Second Circuit's And Not Permitting Petitioners To Amend Their Pleadings Conflicts With The General Approach Of The Circuit Courts.

In the litigation below, Petitioners sought to certify a settlement class, not on a *legal* damages theory, that is, out of pocket losses *by the victims*, which might cause unique individual issues to predominate, thus precluding the certification of the class, but on an *equitable* disgorgement theory. Petitioners argue that profits realized *by the perpetrators* entail no unique individual issues that might predominate, and therefore a disgorgement remedy would not preclude the certification of the class. The District Court rejected the theory, as did the Circuit Court.

The issue of the availability of private equity relief reflects a split in the circuits, as this Court recognized when it granted certiorari to resolve it in *NOW v. Scheidler*, 267 F.3d 687, 697-98 (7th Cir. 2001), *cert. granted on issue, but rev'd on other grounds*, 537 U.S. 393, 397 (2003). This Petition, therefore, presents this conflict anew.

The Fifth Circuit decision assumed, but did not decide, that private parties can obtain equity relief, including disgorgement. The opinion, however, so twisted

the decision it purported to follow (*United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995)) that its result is in conflict with it. In *Carson*, the Second Circuit concluded that disgorgement is available in civil RICO actions, but only for future conduct.[15] The Fifth Circuit's narrow interpretation of *Carson*, however, cannot be squared with *Carson*'s holding or its rationale. In *Carson*, the defendant was a retired union official and the Second Circuit could

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[15] Petitioners are prepared to argue that *Carson* itself is wrongly decided. For present purposes, he only argues that the Fifth Circuit's decision is in conflict with *Carson*. Discussion of the validity of *Carson* itself may be left to the brief on the merits. That argument would proceed first by turning to RICO's language. Contrary to the analysis of *Carson*, "prevent and restrain" is not part of a series from which another word is omitted, but a common law couplet that merely means "equity relief." *See* HENRY WEIHOFFEN, LEGAL WRITING STYLE 50 (1961) (common law couplets, two words meaning the same thing, reflect a time when the principles of law were written with synonymies, one in French and the other in Anglo-Saxon, since it governed two people each speaking its own language). The precise language was taken from the antitrust statutes, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992), where it merely incorporates "the general principles which govern the granting of equitable relief. . . ." *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 218 (1945). Disgorgement is a general equitable remedy. *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946). Disgorgement is an appropriate remedy under RICO. *United States v. Private Sanitation Industry Ass'n*, 44 F.3d 1082, 1084 (2d Cir.), *cert. denied sub nom. Ferrante v. United States*, 516 U.S. 806 (1995). The purpose of disgorgement is to deprive violators of their ill-gotten gains and to deter violations of the law, individually and generally. *SEC v. First Jersey Sec., Inc.*, 101 F.3d at 1474; *Federal Trade Commission v. Gem Merchandising Corp.*, 87 F.3d 466, 469 (11th Cir. 1996); *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir. 1986). In addition, "it is simple equity that a wrongdoer should disgorge his fraudulent enrichment." *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). No linguistic or policy reasons explain why RICO disgorgement should be treated differently.

not see any future-oriented purpose in requiring him to disgorge the fruits of his embezzlement. In sharp contrast, here the perpetrators are big corporations, perpetual in duration and constantly obtaining new revenue. Unlike individual wrongdoers, these defendants will neither retire nor fade away.[16] Without an order requiring them to disgorge their illicit profits, they will remain undeterred and capable of repeating their misconduct through any of the myriad of other chemical products they sell. *In any event, all of this is a matter of proof, not pleading, and Petitioners ought to be entitled to offer proof to support their theories. These matters cannot be decided on the pleadings.* By doing so, the Fifth Circuit not only departed from good pleading standards, but from the holding and rationale of *Carson*.

Nor is it consistent with *Carson* to deny Petitioners relief because the ill-gotten gains were obtained long ago. Respondents engaged in additional misconduct for the purpose of delaying and frustrating Petitioners' ability to obtain relief. As the dissent here correctly observes, the Fifth Circuit's opinion elevates form over substance. It allows wrongdoers to evade responsibility by simply discontinuing an offending product or performing cosmetic modification.[17]

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[16] *See United States v. Private Sanitation Indus Ass'n*, 914 F. Supp. 895, 901 (E.D. N.Y. 1996) (*Carson*, though controlling, distinguished: "Because the corporate defendants in this case will continue to be involved in the Long Island carting industry even if the government's requested relief is granted, the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting illegal conduct.").

[17] In fact, if *Carson*, as interpreted by the Fifth Circuit, is good law, it spells trouble for the Government's civil RICO litigation against the

(Continued on following page)

Finally, Petitioners should have been allowed to amend their complaint. It is unfair to condemn Petitioners because they "fail[] to argue that such disgorgement would 'prevent and restrain' similar RICO violations in the future" (App. 17), when no such requirement existed previously and the new requirement could be satisfied easily by amendment. This, too, is a matter on which the Circuit stands in conflict with the other circuits.[18]

To permit the issue of RICO equity relief, in particular disgorgement, to fester in the circuits is not fair to litigants in the different circuits. Motions to transfer will have as their real reason, not "the correct" or a "more convenient" forum, but to obtain a more favorable circuit law.[19] RICO's effectiveness as a guarantor of integrity of

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tobacco industry, which is premised *solely* on a theory of disgorgement of the illicit profits the industry made selling death-inflicting and addicting cigarettes to underage children, conduct prohibited in all 50 states, in brief, the Government faces the argument, as here, that the industry is "reformed," that is, "trust us not to recidivate," and so no justification can be offered to require it to disgorge its substantial, past illicit gains. *See United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 151-52 (D.C. D.C. 2000). As the dissent here also correctly notes, even if Respondents are out of the PB business, they are publicly traded corporations and subject to being deterred by the loss of profits obtained through misconduct. Failing to require disgorgement when malefactors shift their misconduct from one product to another, only encourages such evasions.

[18] *See, e.g., Branch v. Tunnell*, 937 F.2d 1382, 1388 (9th Cir. 1991) (directing district court to let plaintiffs amend in light of newly adopted pleading standard); *Pross v. Katz*, 784 F.2d 455, 459-60 (2d Cir. 1986) (remanding so that plaintiff could amend to satisfy new pleading requirement).

[19] *See Tel-Phonics Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (RICO; the law of the transferee circuit applied).

the country's national marketplace,[20] an issue sadly in the headlines every day in the context of corporate fraud,[21] is undermined.

If RICO's power to do equity is to be limited, as attempted here by the Fifth Circuit, that reform ought to come from Congress. *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989).[22] Congress, the proper body, has *not* enacted *general* limitations on RICO's enforcement powers. That ought to end the matter, absent constitutional considerations. *United States v. Turkette*, 452 U.S. 576, 587 (1981). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt v. Hughes*, 229 N.Y. 222, 228-29, 128 N. E. 185, 186 (1920), *cert. denied*, 254 U.S. 643 (1920).

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[20] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." CARL KAYSEN et al., ANTITRUST POLICY 17 (1959). Anti-trust focuses on the third, criminally and civilly; RICO focuses on the first and second, criminally and civilly. Together, they seek a market place characterized by integrity, fiscal and physical.

[21] The litany of major company names in the news is dizzying. *See, e.g., The Economist*, June 28, 2003 (Enron, WorldCom, Tyco, Adelphia, HealthSouth, Imcone, Global Crossing, etc.) ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed. . . .").

[22] Congress still sits; it can – as it has – amend RICO. *See, e.g.*, the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, *amending* 18 U.S.C. § 1964(c) (conduct actionable as securities fraud may not be grounds for recovery under RICO).

CONCLUSION

For all of these reasons, Petitioners respectfully request this Court to grant the Petition.

Respectfully submitted,

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2003 WL 22977497

United States Court of Appeals,
Fifth Circuit.

Richard R. **RICHARD**, Jr., on behalf of himself and all others similarly situated, Plaintiff-Appellant,

v.

HOECHST **CELANESE** CHEMICAL GROUP, INC., Hoechst **Celanese** Chemical Group; Shell Oil Company, doing business as Shell Chemical Company; Hoechst **Celanese** Corporation, Hoechst **Celanese** Corporation; E.I. DuPont De Nemours and Company, Defendants-Appellees.

No. 02-41377

Dec. 19, 2003.

Wiener, Circuit Judge, filed opinion concurring in part and dissenting in part.

Mitchell A. Toups, Weller, Green, Toups & Terrell, Beaumont, TX, Arthur R. Miller (argued), Harvard University School of Law, Cambridge, MA, Damon Michael Young, Sr., Young, Pickett & Lee, Texarkana, TX, George Robert Blakey (argued), Notre Dame Law School, Notre Dame, IN, for Plaintiff-Appellant.

Paul M. O'Connor (argued), Seth Alan Moskowitz, Kasowitz, Benson, Torres & Friedman, New York City, Jerry Lamar Mitchell, James W. Bartlett, Jr., Kasowitz, Benson, Torres & Friedman, Houston, TX, for Hoechst Celanese Chemical Group and Hoechst Celanese Corp.

David T. Harvin (argued), Erica Lee Krennerich, Vinson & Elkins, Houston, TX, for Shell Oil Co.

Kathleen Taylor Sooy (argued), Luther Zeigler, Crowell & Moring, Washington, DC, Jim C. Ezer, Schirrmeister Ajamie, Houston, TX, for E. I. DuPont De Nemours & Co.

Appeal from the United States District Court for the Eastern District of Texas.

Before WIENER, CLEMENT, and PRADO, Circuit Judges.

CLEMENT, Circuit Judge:

This case arises from a class action lawsuit brought by **Richard** R. **Richard** ("**Richard**"), on behalf of himself and a putative class consisting of parties who allegedly suffered damages from inherently defective polybutylene ("PB") plumbing systems installed in their homes. **Richard** alleges that Hoechst **Celanese** Chemical Group, Hoechst **Celanese** Corporation (collectively "Hoechst"), Shell Oil Company ("Shell"), and E.I. DuPont Nemours ("DuPont") caused the putative class's injuries through their manufacture, promotion, and sale of PB for use in residential and commercial plumbing systems. **Richard** appeals the district court's dismissal of his class action lawsuit for lack of subject matter jurisdiction with regard to his 42 U.S.C. § 1983 due process claim, and dismissal for failure to state a claim upon which relief can be granted with regard to his RICO claims.

I. FACTS AND PROCEEDINGS

Richard owns and lives in a mobile home with a PB plumbing system. Over time, the leaks from the PB plumbing system have caused substantial damage to

Richard's mobile home. Richard contends that the PB plumbing system is inherently defective.

PB is a by-product of oil refining. Shell, the exclusive seller of PB resin in the late 1970's, developed flexible PB pipes, which other companies like DuPont and Hoechst manufactured. DuPont and Hoechst also used PB resin to develop raw materials for joint fittings in PB plumbing systems.

A. Richard's Allegations

Richard alleges that Shell, DuPont, and Hoechst (collectively the "Appellees") administered a complex scheme to mislead buyers into believing that PB plumbing systems were suitable for use as potable water distribution systems. To this end, the Appellees allegedly claimed that PB plumbing systems were superior to copper plumbing systems based on their representations that PB systems were lightweight, inexpensive, better able to withstand freezing temperatures, easier to install and purportedly enjoyed a lifetime of 50 years. According to Richard, the Appellees knew that these representations were untrue because their scientists allegedly reported that the PB plumbing systems would degrade even when exposed to low concentrations of chlorine typically found in municipal water systems. Richard claims that in spite of this knowledge, the Appellees concealed the information and continued to market these products until approximately 1996.

Richard further claims that before purchasing his mobile home in 1997, he inquired about its plumbing system. The seller informed him that the mobile home was equipped with an exceptionally reliable PB plumbing system that would likely outlast the mobile home itself.

According to Richard, the seller unwittingly made this misrepresentation in reliance on the promotional materials that the Appellees promulgated. Taking these misrepresentations into consideration, Richard purchased the home.

B. The Cox and Spencer Class Action Settlements

The defective PB plumbing systems caused considerable litigation. In 1994, a group of plaintiffs reached a class action settlement in a Texas state court with the Appellees, but the Texas court rejected the settlement. *Beeman v. Shell Oil Co.,* No. 93-047363 (Dist. Ct., Harris County, Tex.). In the meantime, other plaintiffs filed separate PB class actions in Alabama state court and Tennessee state court. *Spencer v. Shell Oil Co.,* No. CV94-074 (Cir. Ct., Greene County, Ala.); *Cox v. Shell Oil Co.,* No. 18,844, 1995 WL 775363 (Tenn.Chanc. Ct., Obion County, Nov. 17, 1995). In 1995, the Appellees entered into a class action settlement in *Cox.* The Tennessee state court approved a national settlement, which required Shell and Hoechst to contribute $950 million to replace eligible consumers' leaking PB plumbing systems and to reimburse them for the property damage which the leaks had caused. In *Spencer,* the Alabama state court approved a class action settlement that required DuPont to contribute further sums toward the repair and replacement of PB plumbing systems.

C. Proceedings in the Present Action

Richard filed his Original Class Action Complaint in the Eastern District of Texas on January 10, 2000, on behalf of himself and a class of similarly situated persons

pursuant to Federal Rule of Civil Procedure Rule 23. In his Second Amended Complaint, he defined the Class as follows:

> All Texas citizens, residents and entities authorised [sic] to do business in Texas that own plumbing systems in structures in Texas and elsewhere, in which there is polybutylene plumbing and over which Tennessee and Alabama courts lacked subject matter jurisdiction.
>
> All U.S. citizens and entities that were excluded from the settlement classes of *Cox v. Shell Oil Co.*, No. 18,844, 1995 WL 775363 (Tenn. Chanc. Ct., Obion City) and *Spencer v. Shell Oil Co.*, No. CV94-074 (Greene Cty., Ala.) because defects in their polybutylene plumbing systems were defined as non-qualifying.
>
> All U.S. citizens and entities that own structures containing polybutylene plumbing systems and have never participated in a polybutylene class action in a court of competent personal and subject matter jurisdiction.

Richard claimed that the Appellees were liable for the damages that he and the class members sustained as a result of the leaks in their PB plumbing systems. The complaint cited theories of conspiracy, strict liability, negligence, and breach of implied warranties. Richard also asserted that the Appellees violated his due process rights, giving rise to a cause of action under 42 U.S.C. § 1983. He based this assertion on his allegation that the Appellees and class counsel in *Cox* colluded in setting up procedural safeguards for class member certification. Richard also alleged that as an absent class member of the *Cox* and *Spencer* suits, he did not receive adequate notice, had no opportunity to opt-out, and did not receive adequate

representation. Finally, Richard amended his complaint to include claims under 18 U.S.C. § 1962(a) of the RICO Act.

On May 25, 2001, Richard and DuPont reached an agreement and jointly moved for preliminary class certification as to DuPont only, and for preliminary approval of a settlement agreement. Shell and Hoechst opposed the motion. On March 30, 2002, the district court issued its memorandum and opinion, holding that: (1) the court did not have jurisdiction over Richard's § 1983 claim because of the *Rooker-Feldman* doctrine; (2) the court had subject matter jurisdiction over the federal RICO claims, but those claims failed to state a claim upon which the court could grant relief under Federal Rule of Civil Procedure 12(b)(6); and (3) Richard did not satisfy requirements for class certification.

Richard timely appeals the district court's dismissal of his claims for lack of subject matter jurisdiction and failure to state a claim under Rule 12(b)(6).

II. STANDARD OF REVIEW

We review *de novo* a district court's dismissal of a claim for lack of subject matter jurisdiction. *Atlas Global Group, L.P. v. Grupo Dataflux,* 312 F.3d 168, 170 (5th Cir.2002). We also review *de novo* a district court's dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Herrmann Holdings, Ltd. v. Lucent Techs., Inc.,* 302 F.3d 552, 557 (5th Cir.2002).

III. DISCUSSION

Richard raises two issues on appeal. First, Richard argues that the district court erred in finding that the

Rooker-Feldman doctrine bars consideration of his 42 U.S.C. § 1983 due process claim. He claims that because *Rooker-Feldman* is consistent with principles of full faith and credit, this Court cannot apply *Rooker-Feldman* to bar a claim challenging a judgment allegedly reached without constitutionally sufficient procedural safeguards. Second, he contends that the district court erred in dismissing his RICO claim because it erroneously construed 18 U.S.C. § 1964 to preclude equitable remedies for private plaintiffs. We address these arguments in turn.

A. Richard's § 1983 Claim

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the Supreme Court held that state courts must resolve constitutional questions that arise during their proceedings. If the state trial court errs in deciding the constitutional issues, the judgment is not void, but the appropriate state appellate court must correct it. *Rooker*, 263 U.S. at 416, 44 S.Ct. 149. Any subsequent recourse to federal court is limited to an application for a writ of certiorari to the United States Supreme Court. *Id.* Consequently, lower federal courts lack jurisdiction to review state court judgments when the constitutional claims are "inextricably intertwined" with the challenged state court judgment. *Feldman*, 460 U.S. at 483 n. 16, 103 S.Ct. 1303.

Our sister circuits have applied the *Rooker-Feldman* doctrine to hold that a federal court does not have jurisdiction over a class action suit that a state court has already adjudicated, even where an absent class member alleges

procedural due process violations. *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510-11 (7th Cir.1996); *Snider v. City of Excelsior Springs, Mo.*, 154 F.3d 809, 812 (8th Cir.1998). In *Kamilewicz*, the plaintiffs argued that *Rooker-Feldman* should not apply to an Alabama state court judgment because the Alabama court did not comply with the procedural safeguards necessary for exercising personal jurisdiction over absent class members. *Kamilewicz*, 92 F.3d at 509. Despite alleging these deficiencies, the plaintiffs also claimed that they did not seek to overturn the Alabama judgment. *Id.* The Seventh Circuit found these positions to be in conflict, and reasoned that the plaintiffs merely sought to set aside a state court judgment. *Id.* at 510. Because the plaintiffs did not present an independent claim, the court applied *Rooker-Feldman*. *Id.*

In *Snider*, absent class members of a state court class action suit alleged that they never received proper notice, and that as a result, they were never parties to the litigation. 154 F.3d at 812. Because they did not receive notice, the absent class members argued that *Rooker-Feldman* should not apply. *Id.* The court, however, did not agree. *Id.* According to the Eighth Circuit, if the federal court found that the absent class members were not parties, then the federal court would have to find that the state court wrongly certified the class and wrongly ordered a final judgment. *Id.* Such a holding would create a procedural due process exception to the *Rooker-Feldman* doctrine, but no such exception exists. *Id.*, *accord Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir.1994) (refusing to find a due process exception to *Rooker-Feldman*).

While we find this reasoning persuasive, we also recognize that the *Rooker-Feldman* doctrine only applies

insofar as a state court judgment merits full faith and credit. *Matsushita Elec. Indus. Co., Ltd. v. Epstein,* 516 U.S. 367, 373, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) (stating that a federal court must give preclusive effect to a state court judgment only to the extent that the law of the state would give preclusive effect to the judgment); *In re Lease Oil Antitrust Litigation,* 200 F.3d 317, 319 n. 1, 320 (5th Cir.2000) (noting that the *Rooker-Feldman* doctrine is consistent with the Full Faith and Credit Act, 28 U.S.C. § 1783); *Gauthier v. Continental Diving Services,* 831 F.2d 559, 561 (5th Cir.1987) (declining to apply the *Rooker-Feldman* doctrine because doing so would require the federal court to give greater deference to a state court judgment than that state's courts would give the judgment); *Kamilewicz v. Bank of Boston Corp.,* 100 F.3d 1348 (7th Cir.1996) (Easterbrook, J., dissenting on request for rehearing en banc). Federal jurisdiction is therefore proper under *Rooker-Feldman* if the state law does not provide preclusive effect to the state court judgment.

In a class action lawsuit, a court may exercise jurisdiction over absent class members only if the court follows certain due process procedures. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). A court must ensure that class members have received adequate notice, representation, and an opportunity to opt-out. *Id.* at 812, 105 S.Ct. 2965. The settlement judgment has no preclusive effect if the court does not comply with these procedures. *Id.* at 805, 105 S.Ct. 2965. Thus, to merit full faith and credit, a state must adhere to the due process guidelines of *Shutts.*

In light of *Shutts,* it would seem that *Rooker-Feldman* does not apply where a state court has not followed the due process requirements for class certification. In the

instant case, Richard attempts to escape the reach of *Rooker-Feldman* by alleging such procedural infirmities. He argues that as a result of the due process deficiencies, the *Cox* state court did not properly exercise jurisdiction over him.

Given the class action nature of this case, it is necessary to resolve the following tension in applying *Rooker-Feldman*. On the one hand, federal courts can examine jurisdictional matters brought before them. If the absent class members were not subject to the state court's jurisdiction or bound by its judgment, then federal courts would have jurisdiction over the absent class members' federal claims. Richard's jurisdictional allegations would thus seem to require a federal court to review whether federal jurisdiction exists, which would necessitate reviewing the disputed findings in *Cox*.

On the other hand, *Rooker-Feldman* prohibits federal review of substantive state court findings. *Rooker*, 263 U.S. at 416, 44 S.Ct. 149. In class action suits, the findings related to procedural due process determine class size, which ultimately affects the final judgment. The findings directly affect the substantive outcome, so challenging them would seem to conflict with the *Rooker-Feldman* doctrine. Here, Richard's allegations indisputably denounce the express findings of the *Cox* state court. Because his challenge would result in setting aside a state court judgment, *Rooker-Feldman* seems to bar federal review of these findings.

Reconciling these seemingly conflicting positions requires further analysis of *Rooker-Feldman*. As noted previously, the Supreme Court held in *Feldman* that "[i]f the constitutional claims presented to a United States

District Court are inextricably intertwined" with the state court's judgment, then the federal district court has no jurisdiction. 460 U.S. at 483 n. 16, 103 S.Ct. 1303. This Court has determined that issues are "inextricably intertwined" when a plaintiff casts a complaint in the form of a civil rights action simply to circumvent the *Rooker-Feldman* rule. *Liedtke,* 18 F.3d at 317.

The *Feldman* holding appears to squarely fit Richard's situation. The *Cox* court's findings that allow for certification are "inextricably intertwined" with Richard's constitutional challenge to the state's compliance with due process requirements. A federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment.

Moreover, the *Liedtke* holding is also applicable here. In order to comply with *Liedtke,* a plaintiff cannot assert a § 1983 claim to circumvent the *Rooker-Feldman* doctrine. 18 F.3d at 317. However, as discussed below, Richard's § 1983 claim is clearly untenable. His blatant nonconformity with the requirements of § 1983 thus suggests that he has merely cast his complaint in the form of a civil rights action in an attempt to circumvent *Rooker-Feldman.* Given that his underlying § 1983 argument fails, the class action procedural issues that Richard raises are irrelevant. Because Richard's § 1983 claim merely serves as an instrument for evading *Rooker-Feldman,* that doctrine bars his claim.

To state a claim under § 1983, a plaintiff must allege facts tending to show that the defendant has acted "under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 102 S.Ct. 2744,

73 L.Ed.2d 482 (1982); *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Flagg Bros. v. Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). "[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Sullivan,* 526 U.S. at 50, 119 S.Ct. 977 (internal quotations omitted). A plaintiff must show that the party charged with depriving the plaintiff of her federal right is an entity that can be fairly described as a state actor. *Lugar,* 457 U.S. at 937, 102 S.Ct. 2744.

This Court has previously outlined the various tests that the Supreme Court employs to determine whether a private party has acted under color of state law. *Bass v. Parkwood,* 180 F.3d 234, 241-43 (5th Cir.1999) (applying the tests to hold that a private mental institution did not act under color of state law by committing the plaintiff). According to the public function test, a private entity acts under color of state law when the entity performs a function which is "exclusively reserved to the state." *Flagg Bros.,* 436 U.S. at 157-58, 98 S.Ct. 1729. (internal quotations omitted); *Wong v. Stripling,* 881 F.2d 200, 202 (5th Cir.1989). The state compulsion (or coercion) test holds the state responsible "for a private decision only when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (internal quotations omitted). Similarly, the nexus or state action test finds state action where the state has "so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357-58, 95 S.Ct. 449, 42

L.Ed.2d 477 (1974); *see also Lugar,* 457 U.S. at 941-42, 102 S.Ct. 2744 (1982).

Richard argues that Appellees acted under color of state law based on the state action test. He relies on *Lugar,* in which the Supreme Court found "joint participation" between a private actor and the state. 457 U.S. at 942, 102 S.Ct. 2744. In *Lugar,* a creditor allegedly failed to meet the statutory requirements for enforcing attachment of the debtor's property, yet state officials seized the property without allowing the debtor to defend the action. *Id.* at 925, 102 S.Ct. 2744. The Court found joint participation because the state officials committed an *ex parte* action at the request of a private party. *Id.* at 942, 102 S.Ct. 2744. In reaching this conclusion, the Court stated that to find state action under § 1983, the plaintiff must satisfy two criteria. *Id.* at 937, 102 S.Ct. 2744. First, the deprivation at issue must "be caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the state or by a person for whom the [s]tate is responsible." *Id.* Second, the private "party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

Although Richard's allegations are sufficient to satisfy the first prong of this test, the allegations fall well short of satisfying the second prong. Richard cannot show that the Appellees can "fairly be said to be . . . state actor[s]." *Lugar,* 457 U.S. at 942, 102 S.Ct. 2744. Richard attempts to reach this conclusion by reasoning that a private party is a state actor if the party either (1) complies with a wrong judgment, or (2) commits wrongful acts that influence a judgment. Both arguments fail. With respect to the first argument, this Court's precedent establishes that even if a court wrongly decides a case, the fact that a

private party complies with that wrong decision does not constitute state action. *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200 (5th Cir.1996). In *Landry*, the plaintiff brought a § 1983 suit for false imprisonment against a bail bondsman. *Id.* Although the bondsman possessed a state-issued warrant, this Court found that he had not acted under color of state law because he did not communicate that he was acting under state authority during the seizure. *Id.* at 204-05. Complying with the state order did not subject him to suit under § 1983. *Id.* Accordingly, even if the *Cox* court wrongly decided the case, the fact that the Appellees complied with the judgment does not imply that the Appellees acted under color of state law.

With respect to Richard's second argument, Richard contends that committing a wrongful act which influences a judgment amounts to "joint participation" with a state official. In support of this contention, Richard relies on *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *Sparks*, the Supreme Court held that private parties acted under color of state law when they conspired *with* a judge. *Id.* at 28, 101 S.Ct. 183. The judge's conscious role in the illegality of the judgment caused the private parties' conduct to be actionable under § 1983. *Id.* In reaching this conclusion, the Court pointed out that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.*

Consistent with the *Sparks* holding, the Second Circuit has rejected the argument that wrongful action by counsel qualifies as "state action" under § 1983. *Dahlberg v. Becker*, 748 F.2d 85, 92 (2d Cir.1984). In *Dahlberg*, the plaintiff alleged that the defendant and her attorneys submitted a false affidavit which influenced a state court

decision. *Id.* at 87-88. The court held that if "a judge . . . unknowingly signs a defective order that has been prepared and submitted to him by an attorney," this does not imply that the attorney acted under color of state law. *Id.*

We agree with the Second Circuit's reasoning in *Dahlberg*. If a judge reaches a decision based on misinformation that counsel provides, the issuance of the decision does not imply that counsel acted under color of state law. *Id.* Applying this principle to Richard's situation leads us to hold that Appellees did not act under color of state law. Like *Dahlberg*, and unlike *Sparks*, Richard does not contend that the judge knowingly participated in the alleged conspiracy. Richard only alleges that the Appellees conspired with opposing counsel *before* a judge. Although the Appellees may have colluded with opposing counsel, Richard fails to allege that the state judge was in any way involved in the misconduct. Indeed, Richard characterizes the state judge as "an innocent agent." Thus, the Appellees are not state actors under § 1983, and Richard fails to state a claim under § 1983.

The failure of Richard's § 1983 claim persuades us that his claim serves only as a means for challenging the state court judgment in federal court. As such, it falls within the scope of claims that we may dismiss "for lack of subject matter jurisdiction because of . . . [the] inadequacy of the federal claim. . . . " *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Richard has attempted to circumvent the *Rooker-Feldman* doctrine by intertwining a groundless § 1983 claim with the state court findings. His jurisdictional challenge to the *Shutts* procedures is irrelevant because the underlying federal claim is unfounded. Under

these circumstances, applying the *Rooker-Feldman* doctrine to bar his claim is entirely appropriate.

B. Richard's RICO Claim

Richard contends that the district court erred in dismissing his claim for equitable relief in the form of a disgorgement of the Appellees' past profits. He argues that equitable relief should be available for private civil RICO plaintiffs under 18 U.S.C. § 1964(a)-(c). This Court has not decided whether equitable relief is available to a private civil RICO plaintiff. *Price v. Pinnacle Brands,* 138 F.3d 602, 605 n. 5 (5th Cir.1998) (stating that this Court "has specifically reserved ruling on whether all forms of injunctive relief and other equitable relief are foreclosed to private plaintiffs under RICO") (internal quotations omitted). The circumstances before us do not necessitate that we reach this question today. Even if equitable relief were available to a private party, disgorgement is not a proper remedy given the circumstances present in this case. Section 1964(a) provides:

> The district courts of the United States shall have jurisdiction *to prevent and restrain violations* of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restriction on the future activities or investments of any person including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provisions for the rights of innocent persons.

18 U.S.C. § 1964(a). The Second Circuit has considered the conditions for disgorgement under this statute in a RICO suit. *United States v. Carson,* 52 F.3d 1173, 1181 (2d Cir.1995). The Second Circuit interpreted § 1964(a) to mean that equitable remedies are only proper to "prevent and restrain *future* conduct rather than to punish *past* conduct." *Id.* at 1182. The court reasoned that the three examples of permissible remedies in § 1964(a) were forward-looking, and focused on preventing future RICO violations. *Id.* at 1181. With respect to the disgorgement remedy sought, the Second Circuit noted that disgorgement is generally available under § 1964. *Id.* However, when disgorgement is sought for the purpose of compensating a party for past injuries, the court held that the plain language of § 1964 bars relief. *Id.* at 1182.

We agree with the Second Circuit's reasoning in *Carson.* Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct. Here, Richard does not seek disgorgement to "prevent and restrain" the Appellees from producing PB plumbing systems. In fact, in his Second Amended Complaint, Richard concedes that the Appellees no longer market the plumbing systems. Furthermore, Richard fails to argue that such disgorgement would prevent manufacturers of similar products from committing similar injuries. Simply stated, he fails to argue that disgorgement would "prevent and restrain" similar RICO violations in the future. Absent this argument, Richard's disgorgement claim seems to do little more than compensate for the alleged loss. The disgorgement claim is therefore impermissible under § 1964(a). By failing to state a proper remedy, Richard's RICO claim is void.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court to dismiss Richard's § 1983 claim based on the district court's lack of subject matter jurisdiction under *Rooker-Feldman*. We also AFFIRM the judgment of the district court to dismiss Richard's RICO claim for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

WIENER, Circuit Judge, concurring in part and dissenting in part:

I concur with the panel majority's disposition of this appeal in every respect except for its treatment of the potential availability of disgorgement of profits as an equitable remedy under 18 U.S.C. § 1964. More specifically, I cannot read § 1964(a) or the Second Circuit's opinion in *United States v. Carson*[1] to eschew the possibility of disgorgement in the instant case. I agree, as does the panel majority, with the *Carson* court's restriction of equitable remedies to prevent or restrain future conduct rather than to punish past conduct,[2] but, respectfully, I find illogical the panel majority's application of that principle to the instant case.

It is true that Richard does not seek disgorgement to prevent or restrain the production of PB Plumbing Systems, which all acknowledge are no longer produced and marketed. The permissible purposes of disgorgement as an equitable remedy are not, however, so limited as to be

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[1] 52 F.3d 1173 (2d Cir.1995).

[2] *Id.* at 1182.

available only to prevent or restrain the continued production and marketing of the particular product that produced the tainted profits in question. First, because the profits disgorged in a civil RICO class action are not necessarily distributed to the class members ratably according to the quantum of their respective injuries, the remedy is not analogous to compensatory damages. Second, disgorgement of ill-gotten gains is closely analogous to the equitable remedy of exemplary damages, as the principal purpose is not simply to punish the offending parties for having conspired to make the illicit profits but to convey a strong message, to the conspirators and to third parties alike, that there is yet another disincentive to engaging in such proscribed conduct. Thus, it seems clear to me that the primary thrust of disgorgement *is* to "prevent and restrain" the offending parties – as well as all potential malefactors who receive the message – from engaging in such activities with *any* product, not just the single discontinued product that happened to have been the object of the proscribed behavior alleged in the particular case.

Neither do I find it determinative that Richard failed to state explicitly in his prayer for the disgorgement remedy that disgorgement "would prevent manufacturers of similar products from committing similar injuries." It has to be self-evident to courts and litigants alike that a prayer for disgorgement of profits in a case like this one is intended to prevent and restrain similar future conduct. To require the incantation of those talismanic words – jurisprudential, not statutory – would be to require a hollow act and to elevate form over substance. By its very nature, disgorgement is designed to "prevent manufacturers of similar products" from engaging in such conduct in

the future, making incidental at best any element of compensation to class members.

As I disagree with the conclusion of my learned colleagues of the panel majority that Richard's RICO claim is void for failure to state a proper remedy, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., ET AL.	§	
	§	
v.	§	**5:00-CV-8**
	§	
HOECHST CELANESE CHEMICAL GROUP, INC., ET AL.	§	
	§	

MEMORANDUM OPINION AND ORDER

(Filed Mar. 30, 2002)

Plaintiff Richard has brought suit on behalf of himself and other similarly situated plaintiffs against Defendants Hoechst Celanese Chemical Group, Inc. and Hoechst Celanese Corp. (Hoechst), Shell Oil Co. d/b/a Shell Chemical Co. (Shell) and E.I. DuPont de Nemours & Co. (DuPont). On May 25, 2001, Plaintiffs and Defendant Dupont (the Settling Parties) made a joint motion for preliminary class certification and preliminary approval of settlement (Dkt. No. 95) (Settlement Motion). This motion is opposed by Defendants Shell and Hoechst, who argue, in their respective motions to dismiss, that the Court does not have jurisdiction to hear the case and that Plaintiff has failed to state a claim upon which relief can be granted. In a similar motion, DuPont moved for dismissal, arguing that this Court does not have jurisdiction to consider Plaintiff's due process claim, and that Plaintiff's due process and RICO claims should be dismissed for failure to

state a claim upon which relief can be granted.[1] DuPont's motion remains pending.

On June 18, 2001, the Court held a hearing on the Settlement Motion. After the hearing, the Court entered an Order instructing the parties to file briefs addressing the contested issue of federal court jurisdiction. On October 17, 2001, the Court held a hearing regarding the Court's jurisdiction. The Court now determines first that it has jurisdiction to hear the present case, second that the class cannot be certified for settlement purposes, and third that Defendants' motions to dismiss for failure to state a claim upon which relief can be granted are well taken and should be granted.

I

BACKGROUND

This is a class action lawsuit brought to recover damages for injury allegedly caused by the Defendants' manufacture, promotion and sale of polybutylene for use in residential and commercial plumbing systems for potable water. The class has not been certified. Plaintiff alleges that not only was polybutylene unsuitable for such use, but that the Defendants knew that their products were defective for this purpose.

Polybutylene resin (polybutylene) is a type of plastic that is produced as a by-product of oil refining. In the late

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[1] DuPont has not withdrawn its motion to dismiss, but will do so upon approval by the Court of the proposed settlement. (DuPont's Reply to Pla. Resp. to Def. Mot. Dism. at 1, Dkt. No. 125.)

1970's, Defendant Shell developed flexible pipes made of polybutylene which were promoted and marketed for residential and commercial potable water plumbing systems. Joint fittings for polybutylene plumbing systems were made from resins developed by Defendants Hoechst and DuPont. The resin developed by Hoechst was marketed under the name "Celcon," and DuPont's was marketed as "Delrin." Defendants produced the materials used in the pipes, joints, fittings and resins that comprised polybutylene plumbing systems. Polybutylene systems were sold to the mobile home industry, recreational vehicle industry, residential developers, plumbing contractors, and individuals. Promoters of polybutylene systems claimed that the product was superior to existing plumbing systems because it was lightweight, inexpensive, better able to withstand freezing temperatures, easier to install and purportedly enjoyed a lifetime of 50 years. Such representations notwithstanding, many polybutylene systems developed leaks when exposed to chlorinated water such as most municipalities use.

Plaintiff Richard brings this action on behalf of himself as well as a class of similarly situated persons pursuant to Fed. R. Civ. P. 23. The Class is defined in the Second Amended Complaint as follows:

> All Texas citizens, residents and entities authorised to do business in Texas that own plumbing systems in structures in Texas and elsewhere, in which there is polybutylene plumbing and over

> which Tennessee and Alabama courts lacked subject matter jurisdiction.[2]
>
> All U.S. citizens and entities that were excluded from the settlement classes of *Cox v. Shell Oil. Co.,* No. 18,844 (Tenn. Chanc. Ct., Obion City) and *Spencer v. Shell Oil Co.,* No. CV94-074 (Greene Cty., Ala.) because defects in their polybutylene plumbing systems were defined as nonqualifying.
>
> All U.S. citizens and entities that own structures containing polybutylene plumbing systems and have never participated in a polybutylene class action in a court of competent personal and subject matter jurisdiction.

(2nd Am.Compl. 6-7).

Plaintiff brought claims under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), the Lanham Act, 15 U.S.C. § 1125(a), the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983[3], and common law tort. In briefings subsequent to the filing of the Second Amended Complaint, Plaintiff dropped his Lanham Act claim, leaving only his RICO and Due Process claims for consideration by this Court. *See* Pla. Memo. in Opp. to Def. Renewed Mot. Dism. 2nd Amend. Compl. at 4, (Dkt. No. 123).

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[2] There have been several cases involving polybutylene plumbing systems. The *Cox* and *Spencer* cases, in Tennessee and Alabama, respectively, resulted in a putative joint national settlement.

[3] Pla. Reply Memo re Prelim. Appr. of Class at 3, Dkt. No. 109.

On April 17, 2001, DuPont filed a renewed motion to dismiss Plaintiff's Second Amended Complaint under Rule 12. (Dkt. No. 65.) On May 25, 2001, the Settling Parties moved the Court to certify the class as to DuPont only, and further to grant preliminary approval of their Settlement Agreement. This motion was made without any retraction by DuPont of its motion to dismiss; instead, DuPont states that it will withdraw its motion to dismiss only after the Court has found that it has jurisdiction to hear the case.[4] (DuPont's Reply to Pla. Resp. to Def. Mot. Dism. at 1, Dkt. No. 125; DuPont's Reply to Shell's Resp. to Settlement Motion, Dkt. No. 111.)

Defendants Hoechst and Shell oppose preliminary approval of the Settlement Agreement. They argue first

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[4] At the October 17, 2001 hearing, DuPont's attorney clarified that while DuPont had filed a 12(b)(6) motion to dismiss the RICO claims, DuPont "never said that the Court does not have subject matter jurisdiction to take a look at those RICO claims." (Oct. 17, 2001, Trans. at 20-21.) DuPont's papers bear this message out. DuPont's April 17, 2001 "Renewed Motion to Dismiss Plaintiff's Second Amended Complaint" (Dkt. No. 89) reaffirmed previous filings on the subject, the most substantial of which was DuPont's October 31, 2000 "Memorandum in Support of its Rule 12 Motion to Dismiss Second Amended Class Action Complaint." (Dkt. No. 65.) In the earlier memorandum, DuPont argued that Plaintiff failed to state a RICO claim, asserting that Plaintiff's RICO arguments failed the 12(b)(6) standard applied in *Summit*. (DuPont's Rule 12 Memo. re. Dism. 2nd Amend. Compl. at 5 (Dkt. No. 65).) Although DuPont did argue that the Court lacked jurisdiction, this was in regard to Plaintiff's due process claim. (Id. at 8.) There was one area of inconsistency, however. In DuPont's October 31, 2000 memorandum, DuPont argued that Plaintiff's RICO claim failed to meet the particularity requirements of Rule 9(b). (DuPont's Rule 12 Memo. re. Dism. 2nd Amend. Compl. at 5 (Dkt. No. 65).) In contradiction to DuPont's briefing, DuPont's attorney opined at the hearing that Plaintiff's RICO statement does overcomes the requirements of 9(b). (Trans. at 20.)

that the Court has not yet determined that it has jurisdiction to hear the case and second that there has been an insufficient showing at this point to warrant approval of the proposed settlement, even on a preliminary basis.

The parties all agree that the first question before this Court is whether or not the Court has jurisdiction to hear the case. As explained below, the Court finds that it has subject matter jurisdiction. Plaintiff and DuPont argue that the Court, after determining that it has jurisdiction, should preliminarily certify the class in order to allow the putative class members to settle with Defendant DuPont. Defendants Hoechst and Shell, on the other hand, argue that the Court should dismiss the case for failure to state a claim upon which relief may be granted. Defendant DuPont has also filed a similar motion to dismiss. The disjuncture of the plans outlined above reveals the curiousness of Defendant DuPont's position. DuPont argues, by urging the Court to take the first course delineated above, that the Court should find that it has subject matter jurisdiction over the instant case and then, pursuant to its jurisdiction, approve the Settlement Agreement. In so arguing, DuPont opposes the second course, that the Court should, in the case that it has subject matter jurisdiction, grant Defendants' – including DuPont's – motions to dismiss the case. The Court will first address the question of jurisdiction, then the question of preliminary class certification, and finally the question of the adequacy of the pleaded claim.

II

DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants have filed both 12(b)(1) and 12(b)(6) motions to dismiss. As a general rule, the district court should resolve a 12(b)(1) motion before the defendant's other challenges because the court must find that it has subject matter jurisdiction before it can determine any other issues. *See Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (5th Cir. 1994). For the reasons detailed below, the Court determines that it has subject matter jurisdiction; Defendants' motions to dismiss for lack of subject matter jurisdiction are therefore denied.

A. Standard

In order to enjoy federal court jurisdiction under 28 U.S.C. § 1331, the plaintiff's cause of action must arise under the Constitution, laws, or treaties of the United States. The federal issue must arise in the complaint itself, and not from the plaintiff's anticipation of a defense based on the federal statute. *See Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983); *Louisville & Nashville RR v. Mottley* 211 U.S. 149 (1908).

Plaintiff maintains that in determining subject matter jurisdiction, the signal question is not whether Plaintiff has alleged incontestable, or even probable, claims under 18 U.S.C. § 1964(c) (RICO), 28 U.S.C. §§ 1343(3) (redress right secured by the constitution) and 42 U.S.C. § 1983

(deprivation of constitutional right)[5]; rather, the question is whether Plaintiff's claims require the Court to construe federal statutes and therefore are contingent upon how those statutes are applied to the facts alleged. Because the Court must construe two federal statutes to adjudicate Plaintiff's claims for relief,[6] the Plaintiff argues that he has adequately alleged subject matter jurisdiction.

Plaintiff distinguishes the question of the Court's subject matter jurisdiction from the analysis necessary to consider a motion to dismiss under Rule 12(b)(6). Unlike a motion under 12(b)(6), Plaintiff argues, an inquiry into subject matter jurisdiction need not address the sufficiency of the allegations.

> [I]t is not necessary to decide whether [Plaintiffs'] alleged cause of action against [Defendants] . . . is in fact a cause of action on which [Plaintiffs] could actually recover. Instead, the test is whether the cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want of jurisdiction.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 70 (1978), *citing Hagans v. Lavine*, 415 U.S. 528, 542 n. 10 ("Once a federal court has ascertained that plaintiff's jurisdiction conferring claims are not insubstantial on their face, no further consideration of the

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[5] Section 1983 creates a claim for relief; it does not grant a federal court jurisdiction to hear the claim. *Hagans v. Lavine*, 415 U.S. 528, 535 (1974). Therefore, for jurisdictional purposes, the Court considers only Plaintiff's RICO and § 1343(3) claims. *See* Pla. Memo in Law re Court's Subj. Mat. Juris. at 4 n. 2, Dkt. No. 117.

[6] *See infra*, note 4.

merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter.") (citations omitted.) The Court finds these arguments well taken. As the Supreme Court stated in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998):

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.,* the courts' statutory or constitutional power to adjudicate the case . . . '[J]urisdiction is not defeated . . . by the possibility that the averments might fail to state a cause . . . of action on which petitioners could actually recover.' Rather, the District Court has jurisdiction if 'the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise [so] completely devoid of merit as not to involve a federal controversy.'

Id. at 89 (citations omitted).

The inquiry into subject matter jurisdiction should not be an inquiry into the *merits* of a particular suit, beyond the broad considerations of insubstantiality and frivolousness outlined by *Steel.* "[W]hen the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the

claim. . . . Unsuccessful as well as successful suits may be brought upon the act. . . ." *Accord The Fair v. Kohler Die and Specialty Co.,* 228 U.S. 22, 25 (1913). In federal question cases, the court has subject matter jurisdiction if, taking as true all the allegations of the complaint, alternative constructions of a federal statute are present, one of which sustains the claim, the other of which defeats it. *John Corp. v. City of Houston,* 214 F.3d 573, 576 (5th Cir. 2000). The Court considers Defendants' objections to Plaintiff's RICO and Due Process claims below.

B. RICO Claim

Defendants make two responses to Plaintiff's arguments in support of federal jurisdiction conferred by his RICO claims. First, Defendants concur that *Steel* controls in this case, but contend that Plaintiff's RICO claim under *Steel* is insubstantial and frivolous. Second, Defendants argue that Plaintiff lacks standing to sue in the instant case. The Court will address both of these arguments in turn.

i. Substantiality of RICO Claim

Defendants argue the Plaintiff's RICO claim is wholly insubstantial because it was not included in Plaintiff's original complaint, and because the Fifth Circuit's decision in *Summit Properties, Inc. v. Hoechst Celanese Corp.,* 214 F.3d 556 (5th Cir. 2000), *cert. denied,* 121 S.Ct. 896 (2001), forecloses it. As concerns Defendants' first protest, a plaintiff may amend his complaint as justice so requires; in this case, the Court granted Plaintiff leave to amend his Complaint. (October 2, 2000 Order, Dkt. No. 59). Therefore, the mere fact that Plaintiff's Complaint was

amended to include RICO claims is not sufficient to demonstrate that Plaintiff's claims are insubstantial.

Defendants' arguments regarding the role played by *Summit,* however, have greater force. In *Summit,* the Fifth Circuit held that the owner of a structure with polybutylene plumbing could not maintain a RICO claim against the defendants unless he could show he personally heard and relied upon the alleged misrepresentations made the basis of his mail and wire fraud claims. *Summit,* 214 F.3d 556. Defendants argue that *Summit* is controlling in the instant case, not least because of the overwhelming similarities between the two cases in the identities of the Defendants and the substance of the claims brought against them.

Plaintiff argues that *Summit* is distinguishable from the instant case. Plaintiff notes that the element of reliance was specifically disavowed by the plaintiffs in the *Summit* decision, while in the instant case, reliance is specifically alleged. Second, and alternately, Plaintiff argues that he falls within the "target" exception articulated by *Summit.* Defendants refute Plaintiff's target exception argument by noting that both *Summit* and *Procter & Gamble Co. v. Amway,* 242 F.3d 539 (5th Cir. 2001), limit the target exception to an instance in which a competitor was injured by reason of the Defendants' fraudulent misrepresentations to consumers that had the effect of diverting business away from the competitor. Defendant argues that Plaintiff is not a "target" within the meaning of those cases as a matter of law.

The Court will not here take up the substance of the parties' arguments; such consideration is addressed in Section IV of this Order. The Court does note, however,

that in order to determine the validity of Defendants' arguments, the Court must consider the *merits* of the parties' arguments. Such consideration is beyond the mandate of the jurisdictional test articulated by *Steel. Steel* held that "[d]ismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise [so] completely devoid of merit as not to involve a federal controversy." 523 U.S. at 89 (citations omitted). Plaintiff's argument that the instant case is distinguishable from *Summit* on the critical question of reliance, as well as his argument that he meets the "target exception" to the *Summit* case requires the Court to consider the *merit* of Plaintiff's arguments, a consideration which exceeds the limits of a court's jurisdictional inquiry. Because Plaintiff has adequately pled his RICO claim, the Court finds that Plaintiff has jurisdiction to bring the instant case before it.

ii. Plaintiff's Standing

To establish standing, a plaintiff must demonstrate (1) an injury in fact, (2) traceable to the defendant's challenged conduct and (3) likely to be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Breaux v. U.S. Postal Serv.,* 202 F.3d 820, 820-821 (5th Cir. 2000). Here, Defendants contest element (2), proximate cause, relying on *Summit,* in which the owner of a structure with polybutylene plumbing could not maintain a RICO claim against the defendants unless he could show he personally heard and relied upon the alleged misrepresentations made the basis of his mail and wire fraud claims.

Plaintiff argues that Defendants perpetrated an unlawful scheme to misrepresent, and caused others to misrepresent, the properties of polybutelene plumbing systems, and that Defendants targeted the putative class members as victims. Plaintiff argues that these allegations establish a clear causal connection between the alleged injury and the Defendants' conduct. "[A] causal connection must exist between the alleged injury and the defendant's conduct." *Lujan* 504 U.S. at 559-60; *Steel,* 523 U.S. at 102-103; *Association of Community Orgs. for Reform Now v. Fowler,* 178 F.3d 350,-356 (5th Cir. 1999). "Causation," for purposes of conferring Article III standing exists solely where the alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct. . . ." *Allen v. Wright,* 468 U.S. 737 (1984).

Defendants argue that Plaintiff's causation argument is effectively precluded by the *Summit* decision. However, as discussed above, Plaintiff has argued that *Summit* is distinguishable from the instant case. Furthermore, as discussed above, the Court cannot determine the applicability of *Summit* to the instant case without examining the *merits* of both Plaintiff's and Defendants' arguments. Any such examination, beyond the broad standard of insubstantiality and implausibility articulated by *Steel,* is improper at the threshold stage of jurisdictional inquiry. The Court therefore finds that the Plaintiff has standing to bring his claims.

C. Due Process Claim

In Plaintiff's Second Amended Complaint, he brought claims of violations by the Defendants of 28 U.S.C. §§ 1343(3) (redress right secured by the constitution) and

42 U.S.C. § 1983 (deprivation of constitutional right) which he has continued, in subsequent briefings to the Court, to maintain. Plaintiff argues that "[t]he putative national class action settlements in *Cox* and *Spencer* purport to deny plaintiff and other members of the Class an opportunity to litigate their claims against the Polybutylene Group." (Pla. 2nd Amend.Compl. ¶ 103.)

Plaintiff concedes that Section 1983 creates a claim for relief but does not grant a federal court jurisdiction to hear the claim. *Hagans v. Lavine,* 415 U.S. 528, 535 (1974); Pla. Memo in Law re Court's Subj. Mat. Juris. at 4 n. 2, Dkt. No. 117. This leaves the 28 U.S.C. §§ 1343(3) (redress right secured by the constitution) claim before the Court for purposes of determining jurisdiction. 28 U.S.C. §§ 1343(3) seeks:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

Hagans, 415 U.S. at 535 (finding that Section 1343(3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction.)

Plaintiff brings his 28 U.S.C. §§ 1343(3) claim based on the alleged denial of rights affected by the *Cox* and *Spencer* settlements. (2nd Am. Compl. at 30.) However, contrary to Supreme Court authority, the relief requested by Plaintiff requests the Court to review the final order and judgment approving the Tennessee nationwide class

action settlement. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), the Supreme Court held that, "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *Feldman,* 460 U.S. at 482. As the Fifth Circuit has explained, "[i]t is axiomatic that a federal district court, as a court of original jurisdiction, lacks appellate jurisdiction to review, modify, or nullify a final order of a state court." *Lampkin-Asam v. Supreme Court of Florida,* 601 F.2d 760 (5th Cir. 1979). Accordingly, Plaintiff cannot seek to have this Court review the final judgments of the *Cox* and *Spencer* Courts.

Even the settling Defendant DuPont, who argues that the Court has jurisdiction to hear this case, objects to jurisdiction under Section 1343(3). DuPont argues that Plaintiff's collateral attack on the *Cox* and *Spencer* judgments, although framed as a § 1983 claim, violates the *Rooker-Feldman* doctrine and that the Court does not have jurisdiction based on that claim. DuPont argues that the Court's jurisdiction must be based on RICO, since "jurisdiction of the . . . Section 1983 claims is doubtful at best." (DuPont's Memo. re Juris. Issues at 2 (Dkt. No. 124); *see also* DuPont's Memo. re Dism. 2nd Amend. Compl. (Dkt. No. 65); DuPont's Reply to Certification Mot. (Dkt. No. 111).) The Court finds that Defendants' motions to dismiss Plaintiff's due process claims for lack of subject matter jurisdiction are well taken and are therefore granted.

III

CLASS CERTIFICATION

On May 25, 2001, Plaintiff and Defendant DuPont moved the Court to certify the class as to DuPont only for purposes of settlement. The DuPont Settlement Class was defined as:

> All persons and entities who own or who previously owned or will own any improvements to real property or structures in the United States in which there is or was during the time of such ownership, a polybutelene plumbing system with acetal insert fittings.

(Jt. Mot. Prelim. Class Cert. Exh. A, Dkt. No. 95.) The Court held a hearing on preliminary approval of the class certification and preliminary settlement on June 18, 2001. At the hearing, the question of the Court's jurisdiction arose; without determining that the Court had jurisdiction to hear the case, the Court could not go forward to address class certification. The Court therefore ordered the parties to file briefs addressing the question of the Court's jurisdiction to hear the case. (June 19, 2001 Order (Dkt. No. 114).) Those briefs were heard before the Court on October 17, 2001. It is Plaintiff's and DuPont's position that the Court does have subject matter jurisdiction to hear Plaintiff's RICO claims, and further that the Court should approve the class certification for purposes of settlement. Shell and Hoechst argued that the Court does not have jurisdiction.

As discussed above, the Court finds that it does have subject matter jurisdiction to hear the case. Plaintiff and DuPont therefore request that the Court go on to approve the preliminary class certification; Defendants Shell and

Hoechst (and DuPont) have filed 12(b)(6) motions to dismiss and desire the Court to next consider these motions. (Oct. 17, 2001 Trans. at 32.) However, before the Court can address these 12(b)(6) motions to dismiss, it must consider the question of class certification. *Miller v. Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Federal Rule of Civil Procedure 23(e) provides that, "A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such a manner as the court directs." Typically, approval of a class action settlement involves a two-step process. First, the Court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel. Second, if the Court determines that the settlement is fair, the Court directs that notice pursuant to Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.[7] *Manual for Complex Litigation, Third*, § 30.41. In the present case, however, no class has been certified, so the Court must first determine if the proposed settlement class is certifiable before it proceeds to make an initial fairness determination. *See Amchem v. Windsor*, 521 U.S. 591, 620 (1997).

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[7] In cases where a class is certified for settlement purposes only, notification of class certification under Rule 23(c)(2) may also be given to members along with 23(e) settlement notice for the sake of economy. *Manual for Complex Litigation, Third*, at § 30.41.

A. Standard

Because making a fairness determination necessarily requires the Court to determine if the proposed class is a proper class for settlement purposes, the Court must examine the law regarding class certification and how that law is applied in the context of a proposed settlement-only class.

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context.

Amchem, 521 U.S. at 620. Here Plaintiff and DuPont request preliminary class certification for the limited purpose of settlement.

A district court may certify a class only if the plaintiff meets its burden to show that the proposed class and the proposed class representatives meet the four prerequisites in Rule 23(a) and one of three additional requirements in Rule 23(b). *See* FED. R. CIV. P. 23; *see also Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 623 (5th Cir. 1999); *Castano v. American Tobacco Co.,* 84 F.3d 734, 740 (5th Cir. 1996). A district court has "great discretion" in determining whether to certify a class, but the district court must make a reasoned and thorough analysis under Rule 23. *Mullen,* 186 F.3d at 624.

The four Rule 23(a) prerequisites include: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. FED. R. CIV. PROC. 23(a); *Amchem,* 521 U.S. at 613. All four must be satisfied in order for the court to certify the class. Once the plaintiff satisfies these prerequisites, he must then satisfy the requirements of one of the three subdivisions of Rule 23(b). *See Amchem,* 521 U.S. at 614. The requirements of these subdivisions include: (1) inconsistent adjudications would result in incompatible standards of conduct or any adjudication would bear heavily on the interests of non-parties; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; and (3) issues of law and fact predominate issues unique to individual class members, and maintaining the class action is the superior procedural vehicle. FED. R. CIV. P. 23(b)(1)-(3).

B. Discussion

The Settling Parties have not articulated which subdivision of Rule 23(b) they satisfy; indeed, the Settling Parties articulate very little regarding the fairness, adequacy, and reasonableness of the settlement. In the hearing before the Court on June 18, 2001, Plaintiff explained that the motion for preliminary certification was the first step Plaintiff envisioned in a series of actions before the Court on route to a final class certification and settlement approval. Plaintiff argued that after making an initial presentation to the Court, he could later provide, "all of the information that the Court will want and will need in order to make a determination whether or not this settlement is fair and should be approved." (June 18, 2001 Trans. at 8.) However, as *Amchem* demonstrates, the Court must conduct a substantial inquiry relating to

certification before it can certify a class, even for purposes of settlement.

Moreover, the Court need not address Plaintiff's motion for preliminary certification on the details of that motion, because the Court finds another significant obstacle to preliminary certification, and that is Fifth Circuit case law regarding certification of RICO claims. Without oppugning its determination that it has jurisdiction in the instant case, the Court notes that in the wake of *Summit* and another Fifth Circuit case, *Patterson v. Mobil Oil,* 241 F.3d 417 (2001), it may not be possible to certify a class in a RICO action within the Fifth Circuit.

In *Patterson,* plaintiff employees brought a class action asserting RICO claims. Plaintiffs asserted that defendant failed to comply with Texas law requiring an employer to obtain workers' compensation insurance in order to benefit from the bar of negligence suits by injured employees. Defendant appealed the certification order of the district court judge. The Fifth Circuit reversed the certification, finding that a fraud class action could not be certified when individual reliance would be an issue, and concluded that the district court erred as a matter of law in certifying the class because the predominance requirement could not be met. Citing *Summit,* the court held that each member of the putative class had to prove reliance upon defendant's alleged fraud in stating it was covered by workers' compensation insurance. To do that, each plaintiff would have to make an individual showing that she could have and would have sued defendant, but did not do so because the asserted false statements led her to believe her suit to be barred by the workers' compensation regime. The court held that while there may have been an issue of fact common to all class members, that question did not

predominate over the question of whether or not each member of the class suffered a RICO injury.

Shortly before deciding *Patterson,* the Fifth Circuit decided *Bolin v. Sears Roebuck & Co.,* 231 F.3d 970 (5th Cir. 2000). In *Bolin,* the plaintiffs sought certification of a class under 23(b)(2), which requires a showing that (1) the behavior complained of is generally applicable to the class as a whole and (2) injunctive relief predominates over damages sought. *Bolin,* 231 F.3d at 975. The Fifth Circuit reversed the district court's certification of the class, finding that "the individual findings of reliance necessary to establish RICO liability and damages preclude not only b(2) certification of this class under RICO, but (b)(3) certification as well." *Id.* at 978.

Patterson and *Bolin* demonstrate the difficulty, if not the impossibility, of certifying a class for settlement purposes in the instant case. The commonality requirement mandated by Rule 23 cannot be met where plaintiffs also seek to fulfill the direct reliance requirements defined by *Summit. Patterson,* 241 F.3d at 419; *Bolin,* 231 F.3d at 978; *see also Castano v. American Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996) (stating that reliance should not be inferred by a district court because an accurate finding on predominance is necessary before the court can certify a class).

IV

DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Standard

Under the Federal Rules of Civil Procedure, Rule 12(b)(6) motions to dismiss are appropriate where the defendant or counter-plaintiff attacks the complaint because it fails to state a legally cognizable claim. A motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court in *Conley v. Gibson*:

> [I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45 (1957); see also *Grisham v. United States,* 103 F.3d 24, 25-26 (5th Cir. 1997).

B. RICO Claim

For the purposes of determining the sufficiency of Plaintiff's RICO claim, the Court assumes that the facts alleged in Plaintiff's Second Amended Complaint and RICO Statement are true. The question is then whether or not Plaintiff can state a claim in RICO under such facts in

the Fifth Circuit. For the reasons below, the Court holds that Plaintiff cannot.

i. ***Summit Properties, Inc. v. Hoechst Celanese Corp.***

In the Fifth Circuit's *Summit* decision, a group of plaintiffs who owned properties in which polybutylene plumbing systems were installed brought suit for violations of civil RICO against a group of defendant polybutylene manufacturers. That group included the Defendants of the instant case. The *Summit* plaintiffs contended that defendants manufactured and marketed polybutylene systems and components through a complex scheme to defraud building code approval officials, members of the building industry such as builders and plumbers, and other consumers.

The *Summit* plaintiffs conceded that they did not detrimentally rely on any of the defendants' allegedly fraudulent misrepresentations that served as the basis for the RICO claims. They argued that individual acts of reliance on the predicate mail or wire fraud are not necessary to establish the proximate causation prong of a claim under RICO. The Fifth Circuit disagreed, holding that *direct reliance on the misrepresentations* is required by the RICO statute, 18 U.S.C. § 1962, *et seq.*

Summit thoroughly considered the rationale for requiring reliance:

> [In] a claim for fraud . . . the linkage is between the defendants' fraud and the injury. As a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. . . . The causal connection between

> a misrepresentation and a subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision. In other words, even if intermediary builders, plumbers, code officials, or prior owners relied on the defendants' alleged misrepresentations when choosing to use or approve [polybutylene] plumbing, that does not tell us whether the defendants' fraud proximately caused the plaintiffs' injuries, for which the defect was a producing cause. At best, any fraud during the sale of those products proximately injured only those initial purchasers who relied on the alleged misrepresentations, since the fraud facilitated a sale that might not otherwise have been made.

Id. at 560. Under such a rationale, the court contemplated only two groups able to bring actions under RICO: distributors who directly relied on defendants' representations, and competitor manufacturers injured by sales of defendants' defective merchandise. Plaintiffs in the instant case fall under neither category.

ii. Discussion

Plaintiff argues that the instant case is distinguishable from *Summit* in two significant respects. First, Plaintiff argues that the plaintiffs in *Summit* conceded that there was no reliance, while Plaintiff here does not so concede, and second, Plaintiff argues that *Summit* never determined whether the plaintiffs in that case might fall under the "target exception" that it articulated.

Regarding reliance, the Court finds that the only notable distinction between the causation elements in

Summit and the instant case are in name. While Plaintiff in the instant case alleges indirect reliance and the *Summit* plaintiffs conceded that there was no reliance, Plaintiff's Complaint does not demonstrate any fact situation which might distinguish his relationship with Defendants from those relationships which existed in *Summit.* Plaintiff describes a number of allegedly false communications made by Defendants. Some of the communications were made among the Defendants; others were made to the manufacturers of the plastic piping in question. Not a single communication is alleged to have reached the Plaintiff, however. Instead, Plaintiff states, for example, that "The Polybutylene Group's [i.e., the Defendants'] promotion and sale of polybutylene systems, including fraudulent and false statements relied on by Plaintiff and other members of the Class, were intended to and did assure the plaintiff and Class members that the polybutylene systems were suitable for potable water plumbing systems." (2nd Amend. Compl. at 23.) But Plaintiff fails to specifically identify the allegedly fraudulent statements upon which he relied to his detriment. In fact, Plaintiff never states that he himself actually saw or heard a false communication. Nor does he contend that the intermediaries in this case – the manufacturers of plastic piping – communicated the alleged misrepresentations to the putative class.

As was the case in *Summit,* Plaintiff has not shown that there was any misrepresentation, or reliance thereon, made to Plaintiff *directly.* The necessity of direct reliance was the holding of *Summit.* As Defendant DuPont stated, prior to its request to settle with Plaintiff:

> The *Summit* decision is wholly dispositive of Plaintiff's five RICO counts. . . . Plaintiff's RICO

> statement shows that the facts on which Plaintiff relies with respect to DuPont are not only similar to those in *Summit,* they are identical. . . . The Fifth Circuit held as a matter of law in *Summit* that those allegations failed to state a claim and are subject to dismissal under Fed. R.Civ. P. 12(b)(6). That decision is binding here.

(DuPont's Memo. in Support of its Renew. Mot. to Dism. Pla. 2nd Amend. Compl. at 2-4.)

With respect to Plaintiff's "target exception" argument, the Court finds it similarly unpersuasive. Plaintiff argues that the Fifth Circuit did not expressly determine that the *Summit* plaintiffs did not qualify under the "target exception"; at the October 17, 2001 Jurisdiction Hearing, Plaintiff reasoned that the *Summit* court never reached the question of whether the plaintiffs were the "targets" of the defendants' allegedly fraudulent acts. As such, Plaintiff argued, the question of whether Plaintiff meets the target exception to the *Summit* holding is open to this Court.

As noted above, *Summit* contemplated two groups that might qualify for its "target exception": distributors who directly relied on defendants' representations, and competitor manufacturers injured by sales of defendants' defective merchandise. The *Summit* court took care to explain the rationale behind this exception, and then took equal care in explaining why such a rationale did not apply to the *Summit* plaintiffs:

> [W]hen an action poses a high and foreseeable risk on a third party, we may view the resulting injury as deliberate for the purpose of liability [considering why brokerage customers might recover under RICO for losses stemming from a series of fraudulent transactions]. . . . In the

> present case, however, the plaintiffs' risks of injuries did not arise as direct and contemporaneous results of any alleged fraud, but instead arose only later, through the purchases of allegedly defective plumbing by transactions which were not tainted with fraud.

Id. at 561. The Court finds that the *Summit* decision itself addressed the unraised theory that the *Summit* plaintiffs might be a target exception to the proximate causation requirements found under RICO. The Settling Parties cite *Alpha/Omega Ins. Serv., Inc.,* 272 F.3d 280, 284 (7th Cir. 2000) in defense of their "target exception" argument, arguing that the *Summit* plaintiffs first asserted the target exception argument in their motion for rehearing, and therefore the court did not reach the merits of whether the plaintiffs could proceed on a target theory. The *Alpha/Omega* Court found that "because a summary denial of a petition for rehearing does not explain the bases for the denial, it is 'insufficient to confer any implication or inference regarding a court's opinion relative to the merits of a case.'" *Id.,* citing *United States v. Thomas,* 11 F.3d 732, 726 (7th Cir. 1993). However, unlike the court in *Alpha/Omega,* the *Summit* Court did consider the substance of the issue in question, and found that the *Summit* plaintiffs did not fit the court's "target exception."

Plaintiff points to the Fifth Circuit's holding in *Proctor & Gamble Co. v. Amway Corp.,* 242 F.3d 539 (5th Cir. 2001) as an example of how *Summit*'s "target exception" might be applied to the RICO claims of the instant case. In *Proctor & Gamble,* the plaintiff P&G alleged that using the wire and the mail, defendant Amway attempted to lure P&G's customer's away by fraud. The fraud consisted of a rumor that P&G is a Satanic company whose president

worships Satan and whose profits go in part to the church of Satan. The *Proctor & Gamble* Court found, relying on the "target exception" articulated in *Summit,* that P&G's RICO claims based on Amway's alleged spreading of the Satanism rumor to lure customers from P&G were claims on which relief could be granted. The court determined that although P&G did not rely on the fraud, the situation fell into the narrow exception carved out by *Summit,* in which the *Summit* Court stated that "in the current case, for example, the defendant's competitors might recover for injuries to competitive position. . . ." *Proctor & Gamble,* 242 F.3d at 565 (citing *Summit,* 214 F.3d at 561).

The circumstances of *Proctor & Gamble* are not those faced by Plaintiffs in the instant case: Plaintiff is not one of Defendants' competitors seeking to recover for injuries to competitive position. For this reason, the Court does not concur that the holding of *Proctor & Gamble* pertains to the case at bar. Furthermore, as stated above, the case that bears a nearly identical resemblance to the case currently before the Court is the *Summit* decision itself. In that case, the Fifth Circuit articulated its "target exception" with total cognizance of the situation in which plaintiffs found themselves, and yet determined that plaintiffs did not fall within the "target exception." Between *Summit* and the case at bar, Plaintiffs have altered only one aspect of their case: here they allege reliance, whereas in *Summit* they did not. This allegation of reliance, however, is not sufficient to overcome *Summit*'s holding barring Plaintiff's claim.

iii. Equity Relief

During the October 17, 2001, hearing, Plaintiff raised a new argument regarding the potential for equitable relief under RICO. Plaintiff suggested that an equitable remedy, following the Seventh Circuit case of *NOW v. Scheidler,* 267 F.3d 687 (2001), is applicable to the case at bar. (Oct. 17, 2001 Trans. at 16-18.) The Court requested briefing on the subject and the parties complied. After reviewing the briefing, the Court concludes that Plaintiff's arguments in equity do not assist the Court in determining whether Plaintiff has stated a claim upon which relief may be granted.

Plaintiff argues that *Scheidler* provides a basis for recovery that is wholly separate from both the "target exception" articulated in *Summit* and applied in *Proctor & Gamble,* and from *Summit*'s reliance requirement. According to Plaintiff, *Scheidler* gives Plaintiff a viable claim, not for damages relief, but for equitable recovery. Plaintiff concludes that thus *Scheidler* provides a separate basis for the Court's subject matter jurisdiction. (Pla. Memo. of Law in Resp. to Jan. 12, 2002 Order, at 4.) As discussed above, the Court has already determined that it has subject matter jurisdiction to consider Plaintiff's RICO claim. Thus the Court will not address Plaintiff's contention that *Scheidler* provides the Court with an alternate argument to determine that it has jurisdiction to hear the instant case. Instead, the Court is concerned with what *Scheidler* might add to the Court's assessment of the viability of Plaintiff's claim.

Relying on *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1167 (5th Cir. 1979), *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983) ("*AGC*"), and *Cargill, Inc. v.*

Monfort of Colorado, Inc., 479 U.S. 104 (1986), Plaintiff argues that "[p]lainly, once Plaintiffs, at their option, claim only equity relief – *i.e.* not damages – the rationale for requiring reliance to distinguish direct from indirect or remote claimants wholly disappears. Only *traditional* proximate cause between violation and injury need be shown." *Id.* (emphasis in original.) (Pla. Reply. Memo re Jan. 16, 2002 Order at 5-7 (Dkt. No. 170); Pla. Resp. to Sur-Reply re: Jan. 16, 2002 Order at 4 (Dkt. No. 172).) The equitable relief that Plaintiff asserts is disgorgement of profits. Plaintiff thus perceives his arguments in equity as an escape from the heavy burden regarding proximate cause imposed by *Summit*.

The Court does not find this argument well taken. While Plaintiff creatively lays out a jurisdictional history designed to show that seeking equitable relief under RICO makes the standing/proximate cause requirements (and their justifications) completely different than when damages are sought, the Court does not find this supposition well supported. Plaintiff argues that because claims for equitable relief present no risk of duplicative recoveries or complex allocation problems, in contrast to treble-damages actions, the strict requirements exacted in claims for damages are sometimes relaxed. In support of this contention, Plaintiff cites *Cargill*'s determination that some factors considered in determining standing for damage relief (§ 4 of the Clayton Act) are not relevant when considering standing for equitable relief (§ 16 of the Clayton Act). *Cargill*, 479 U.S. at 111 n.6. *Cargill*'s holding, however, is not applicable to the case at bar. While the *Cargill* Court did find that, "the difference in remedy each section provides means that certain considerations relevant to a determination of standing under § 4 are not

relevant under § 16," *id.*, that finding is misapplied by the Plaintiff to the case currently before the Court. Section 16 of the Clayton Act contemplates *threatened* loss or damage, and only equitable relief is available. It is not surprising that *future* loss or damage would mandate a different, even more relaxed, standing requirement than *actual* loss or damage (addressed by § 4 of the Clayton Act). Therefore, *Cargill* does not stand for the proposition that there is a relaxation of the standing requirements. Rather, it explores the ways in which distinct – although related – causes of action affording distinct remedies rely on distinct standards. In contrast, Plaintiff has brought a claim for damages based on *actual* loss. In *Bolin,* 231 F.3d 970, the Fifth Circuit rejected a class certification requesting injunctive relief where it found that damage claims predominated. Finally, *Cargill* is naturally distinguished from the instant case because unlike the Clayton Act, the RICO statute does not expressly contemplate equity damages for private plaintiffs for actual ***or*** threatened loss.

Moreover, Plaintiff's foundational claim that equitable relief is permissible under RICO is tenuous at best. Plaintiff relies on *Scheidler* to tie its contentions together, although that case appears to be unique in its permission of equitable remedies under RICO. Even Plaintiff's partner in settlement, DuPont, criticizes Plaintiff's arguments under *Scheidler,* pointing out that:

> Before *Scheidler,* no federal court of appeals had held that private plaintiffs could seek injunctive relief under RICO. The Ninth Circuit has held that private plaintiffs may *not* seek such relief. *Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076 (9th Cir. 1986); *cert. denied,* 479 U.S. 1103 (1987). . . . Other federal courts have in *dicta* either rejected or expressed serious doubts about

> the proposition that private plaintiffs may seek injunctive relief under RICO (*citations omitted*). . . . For these reasons, this Court should not base its subject matter jurisdiction on the shaky ground provided by *Scheidler*. . . .

(DuPont's Resp. to Jan. 16, 2002 Order (Dkt. No. 164).) To the extent that courts in the Fifth Circuit have considered equitable remedies under RICO, the idea has been dismissed. *See Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977 n. 42 (5th Cir. 2000) ("There is considerable doubt that injunctive relief is available to private plaintiffs under RICO"); *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988) (expressly adopting the reasoning of *Wollersheim* in holding that RICO does not authorize private plaintiffs to seek an injunction that would freeze the assets of defendants); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602 (5th Cir. 1998) (holding that because plaintiffs were not able to allege sufficiently injury to their business or property proximately caused by the defendant's allegedly wrongful conduct, the Fifth Circuit did not need to decide whether injunctive relief was available to private RICO plaintiffs).

Summit provides a roadmap of the factors necessary to demonstrate that plaintiff has a viable RICO claim. One of the factors, and the aspect of the instant case contested by the parties, is the requirement that the plaintiff demonstrate direct reliance on a fraudulent misrepresentation. *Summit* forecloses the possibility that a plaintiff in the position where Richard finds himself might collect under RICO; *Scheidler* does not, so far as the Court can see, answer that restriction enacted by *Summit*. For the foregoing reasons, the Court finds that Plaintiff's RICO claim does not state a claim upon which relief can be granted.

V

CONCLUSION

For the reasons discussed above, it is hereby ORDERED that Defendants' motions to dismiss for lack of subject matter jurisdiction are hereby Denied and Plaintiff's motion to certify the class (Dkt. No. 95) is DENIED and Defendants' motions to dismiss for failure to state a claim (Dkt. Nos. 87, 89, 91) are GRANTED.

Signed this 30th day of March, 2002.

/s/ David Folsom
DAVID FOLSOM
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41377

D.C. Docket No. 5:00-CV-8

RICHARD R RICHARD, JR, on behalf of himself and all others similarly situated

Plaintiff-Appellant

v.

HOECHST CELANESE CHEMICAL GROUP INC, Hoechst Celanese Chemical Group; SHELL OIL COMPANY, doing business as Shell Chemical Company; HOECHST CELANESE CORPORATION, Hoechst Celanese Corporation; E I DUPONT DE NEMOURS AND COMPANY

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Texas, Texarkana.

Before WIENER, CLEMENT, and PRADO, Circuit Judges.

JUDGMENT

(Filed Dec. 19, 2003)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

WIENER, Circuit Judge, concurs in part and dissents in part:

ISSUED AS MANDATE: FEB 19 2004

E.O.D. 8/30/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., on behalf of himself and all other similarly situated,	§	
	§	**CASE NO. 500-CV-008**
Plaintiff,	§	
vs.	§	
HOECHST CELANESE CHEMICAL GROUP, INC.; SHELL OIL COMPANY D/B/A SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; and E.I. DUPONT DE NEMOURS & COMPANY,	§	**Judge David Folsom**
Defendants.	§	

FINAL JUDGMENT
(Filed Aug. 30, 2002)

Came on to be heard Plaintiff's Motion for Final judgment pursuant to Fed.R.Civ.P. 58. The Court, having considered said Motion, and the Response, if any, is of the opinion that said Motion should be granted. It is, therefore,

ORDERED, ADJUDGED and DECREED by this Court that there is no just reason for delay and this Court hereby enters a Final Judgment dismissing all of Plaintiff's claims.

SIGNED this 30th day of Aug., 2002.

/s/ [Illegible]
HONORABLE DAVID FOLSOM
U.S. DISTRICT JUDGE
PRESIDING

E.O.D. 4/23/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., ET AL.	§	
	§	
v.	§	5:00-CV-8
HOECHST CELANESE CHEMICAL	§	
GROUP, INC., ET AL.	§	

ORDER

(Filed Apr. 23, 2002)

In the wake of the Court's March 30, 2002, Memorandum Opinion and Order, Defendants Hoechst and Shell have requested clarification regarding the question of whether, in dismissing Plaintiff's federal law claims, the Court also dismissed Plaintiff's pendant state law claims. (Dkt. Nos. 176 and 177.) It is hereby ORDERED that having dismissed Plaintiff's federal law claims, the Court also dismisses without prejudice Plaintiff's pendant state law claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Signed this 23 day of April, 2002.

/s/ [Illegible]
DAVID FOLSOM
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41377

RICHARD R RICHARD, JR, on behalf of himself and all others similarly situated

Plaintiff-Appellant

v.

HOECHST CELANESE CHEMICAL GROUP INC, Hoechst Celanese Chemical Group; SHELL OIL COMPANY, doing business as Shell Chemical Company; HOECHST CELANESE CORPORATION, Hoechst Celanese Corporation; E I DUPONT DE NEMOURS AND COMPANY

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Texas, Texarkana.

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 12/19/03, 5 Cir., ___, ___ F.3d ___)

(Filed Feb. 11 2004)

Before WIENER, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Judge Benavides did not participate in the consideration of the rehearing en banc.

Wiener, Circuit Judge, would grant rehearing.